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FRANKLIN K. LANE, SECRETARY

BUREAU OF MINES

VAN. H. MANNING, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS

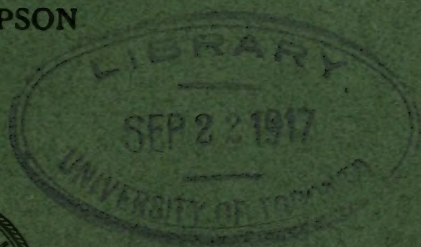
ON

MINES AND MINING

REPORTED FROM  
JANUARY TO APRIL, 1917

BY

J. W. THOMPSON



WASHINGTON  
GOVERNMENT PRINTING OFFICE  
1917





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# ABSTRACTS OF CURRENT DECISIONS ON MINES AND MINING, JANUARY TO APRIL, 1917.

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BY J. W. THOMPSON.

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## MINERALS AND MINERAL LANDS.

### MINERALS.

#### PROCESS OF ORE CONCENTRATION—OIL FLOTATION—INFRINGEMENT OF PATENT.

The Sullman, Picard & Ballot patent, No. 835120, is a process of concentrating ore which consists in mixing the powdered ore with water, adding a small proportion, a fraction of 1 per cent on the ore, of an oily liquid having a preferential affinity for metal-liferous matter, agitating the mixture until the oil-coated mineral matter forms into a froth and separating the froth from the remainder by flotation. The process is known as an air-flotation process which consists in the use of a frothing agent in conjunction with such agitation of the ore pulp as will distribute the metallic particles of the ore throughout the mixture and produce bubbles of air and bring them in contact in the mixture with the metallic particles so distributed. The bubbles will become attached to such metallic particles, carrying them separately from the particles of gangue up through the surface of the mixture where they can be readily collected by skimming, by overflow, or by the use of other well-known devices. The air-flotation process was a patentable invention in the discovery made in March, 1905, and was not anticipated and is valid. Prior to that time there had been no suggestion in the arts that a proportion of 0.1 per cent of oil to ore or of any other fraction of 1 per cent of oil to ore would or might result in successful concentration. While the ascertainment that such a minute proportion of oil would affect a successful concentration of ore through a flotation process was a discovery, it was nevertheless of such a character, viewed with respect to the circumstances under which it was made, as to involve invention and confer patentability.

*Minerals Separation v. Miami Copper Co.*, 237 Fed., 609, pp. 611, 616.

## ORE CONCENTRATION PROCESS—VALIDITY OF PATENT.

Claims 1 and 12 of the Sullman, Picard & Ballot patent, No. 835120, for a process of concentrating ore, known as the air-flotation process, are valid; but claim 9 is so indefinite as to render the claim void. The object of the Sullman, Greenway & Higgins patent, No. 962678, dated June 28, 1910, for improvements in ore concentration, is to separate metalliferous matter, graphite, and the like from gangue by means of oil, fatty acid, or other substances which have a preferential affinity for metalliferous matter over gangue, and it is valid. The Greenway patent, No. 1099699, dated June 9, 1914, for improvements in the concentration of ores is invalid, as in view of the prior art the omission to use acid in the process can not confer patentability.

*Minerals Separation v. Miami Copper Co.*, 237 Fed., 609, pp. 630-634-636.

## SULLMAN, PICARD &amp; BALLOT PATENT—VALIDITY.

The process of the Sullman, Picard & Ballot patent, dated November 6, 1906 (No. 835120), consists in the use of an amount of oil which is "critical" and minute compared with the amount used in prior processes. The amount of oil used in this patent amounts to a fraction of 1 per cent on the ore and in so impregnating with air the mass of ore and water used, by agitation or by beating the air into the mass and causing to rise to the surface of the mass of pulp a froth peculiarly coherent and persistent in character and that is composed of air bubbles with only a trace of oil in them and which carry in mechanical suspension a very high percentage of the metal and metalliferous particles of ore that were contained in the mass of crushed ore subject to the treatment. This froth can be removed and the metal recovered by processes aside from the patent. The process of this patent is not of the metal sinking class and while it may be described as a surface flotation process yet it differs so essentially from all prior processes, in its character, in its simplicity of operation, and in the resulting concentrate, as to constitute a new and patentable discovery. The prior processes required the use of so much oil that they were too expensive to be used on lean ores, to which they were intended to have their chief application. This patent differs essentially from all previous results. Oil, while one of the substances still used, is used in quantities much smaller than in any previous patent and produces a result never before obtained. The minerals are obtained in a froth of peculiar character consisting of air bubbles, which in their covering film have the minerals embedded in such manner that they form a complete surface all over the bubbles. Although the light and easily destructible air bubbles



are covered with a heavy mineral, the froth is stable and different from any froth known before, being so permanent in character that it will stand for 24 hours without any change having taken place. The simplicity of the process consists in adding a minute quantity of oil to the pulp to which acid may or may not be added, and then agitating  $2\frac{1}{2}$  to 10 minutes and after a few seconds collecting from the surface the froth which will contain a large percentage of the minerals present in the ore or pulp.

*Minerals Separation v. Hyde*, 242 U. S., 261, p. 268.

See *Minerals Separation v. British Ore Concentration Syndicate*, 27 R. P. C., 33.

#### PATENT—OIL-FLOTATION PROCESS.

The processes of oil flotation are divided into two classes as recognized in the patents: The process in the patents of the first class is called the surface flotation process and depends for its usefulness on the oil used being sufficient to collect and hold in mechanical suspension the small particles of metal and metalliferous compounds, and by its buoyancy to carry them to the surface of the mixture of ore, water, and oil, thus making it possible by methods familiar to those skilled in the art to float off the concentrate thus formed into a desired receptacle. The waste material or gangue not being affected by the oil and being heavier than water sinks to the bottom of the containing vessel and is disposed of. The process of the other class is called the metal sinking process, and reverses the action of the surface flotation process in which oil is used to the extent of 4 to 10 per cent of the weight of the metalliferous matter, depending on the character of the ore, for the purpose of agglomerating the oil-coated concentrate in granules heavier than water and these then sink to the bottom of the containing vessel and permit the gangue to be carried away by an upward flowing stream of water.

*Minerals Separation v. Hyde*, 242 U. S., 261, p. 264.

#### PATENT—TREATMENT OF ORE.

A number of patents have been granted in this and other countries for processes aiming to make practical use of the property of oil and of oil mixed with acid in the treatment of ores, all of which consists of mixing finely crushed or powdered ore with water and oil and sometimes with acid added, and then in variously treating the mass or pulp thus formed so as to separate the oil when it becomes impregnated or loaded with the metal and metalliferous bearing particles from the valueless gangue, and from the resulting concentrate the minerals are recovered in various ways.

*Minerals Separation v. Hyde*, 242 U. S., 261, p. 264.

## PATENT—AFFINITY OF OIL AND METALS.

In the concentration of ores it has become a well-known fact that oil and oily substances have a selective affinity or attraction for and will unite mechanically with minute particles and metalliferous compounds found in crushed or powdered ores, and will not so unite with the quartz, or rocky nonmetalliferous mineral called gangue. It is also well known that this selective property of oils and oily substances is increased when applied to some ores by the addition of a small amount of acid to the ore and water used in the process of concentration. These principles were the bases of the Haynes, British patent (1860), and United States patents, Everson (1886), Robson (1897), Elmore (1901), and Cattermole, (1904).

*Minerals Separation v. Hyde*, 242 U. S., 261, p. 264.

## SULLMAN, PICARD &amp; BALLOT PATENT—TREATMENT OF DIFFERENT ORES.

The Sullman, Picard & Ballot patent, No. 835120, is not invalid on the ground that when different ores are treated preliminary tests must be made to determine the amount of oil and extent of agitation necessary in order to obtain the best results. Such variation of treatment must be within the scope of the claims, and the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject matter. The composition of ore varies infinitely, each one presenting its special problem, and it is impossible to specify in a patent the precise treatment which would be most successful and economical in each case. The process deals with a large class of substances and the range of treatment with the terms of the claims, while leaving something to the skill of the persons applying the patent, is clearly and sufficiently definite to guide those skilled in the art to its successful application.

*Minerals Separation v. Hyde*, 242 U. S., 261, p. 270.

## SULLMAN, PICARD &amp; BALLOT PATENT—CLAIMS VALID AND INVALID.

The Sullman, Picard & Ballot patent, No. 835120, for a process of oil concentration is valid as to claims 1, 2, 3, 5, 6, 7, 12, and invalid as to claims 9, 10, 11. The validity of claims 4, 8, and 13 was not involved and, therefore, not considered.

*Minerals Separation v. Hyde*, 242 U. S., 261, p. 271.

## ROYALTIES.

Royalties received by a lessor under mineral leases constitute rents and profits of land.

*Pettit's Estate, In re*, 161 Northwestern, 158, p. 161.



**SALE AND CONVEYANCE.****CONSTRUCTION OF OPTION CONTRACT—PAROL EVIDENCE TO EXPLAIN.**

The owners of a large tract of mineral land agreed with certain persons on the sale of the land at a stated price, if such second persons succeeded in making a sale. The persons acting as agents, to facilitate the sale, organized a corporation, and on their request the owners conveyed the land to the corporation, under an agreement that the corporation would reconvey the property to the owners, and notes were executed by the corporation, representing the price agreed upon. It was not the intention of any of the parties to the transaction that if the land was not sold that the corporation should own and hold the land, and be indebted for the amount of the notes. Under such circumstances the deed to the corporation, in the light of the testimony as to the intention of the parties, was nothing more than an option agreement, and on failure of the original parties undertaking to sell the land to make a sale, the deed to the corporation became ineffective, transferred no title, and did not operate as a mortgage to secure the payment of the contract price.

*Arizona Copper Estate v. Watts*, 237 Fed., 585.

**OPTION AGREEMENT TO REPURCHASE—SPECIFIC PERFORMANCE.**

A mining company sold and conveyed a tract of land owned by it from part of which it had mined and removed the coal and reserved, by the terms of the deed, the remaining coal under the tract conveyed. The deed also contained an option agreement to repurchase, by the grantor, all or any portion of the premises conveyed for the average price per acre paid by the purchaser. No time was specified in which the repurchase should be made. Specific performance of the agreement to repurchase and reconvey will not be decreed after a lapse of more than 10 years, and where it appeared that the purchaser had placed improvements on the land to the value of \$4,000, with the knowledge of the grantor and where no offer was made to pay for the improvements.

*Audo v. Western Coal & Mining Co. (Kansas)*, 162 Pacific, 344, p. 347.

**CONSTRUCTION OF CONTRACT.**

The owner of mining claims entered into an agreement with a purchaser whereby the owner sold to the purchaser seven mining claims, together with improvements thereon. By the agreement the purchaser was given a choice to pay the sum of \$16,000 in full for the mining claims, or to pay the sum of \$21,000 under different circumstances. It was to be paid in certain stated installments. If the purchaser elected to pay \$21,000, the payments were to be on

different stated installments, \$9,000 of which was to be paid out of one-half of the net proceeds of the mine. The purchaser elected to pay the \$21,000 upon the stated terms, and paid the sum of \$12,000 thereon and obtained the deed, as provided in the contract. Under the terms and conditions of the contract, the seller could not sue and recover, after the expiration of a period of eight years, the remaining \$9,000 due under the agreement, where it appeared that the purchaser had not operated the mine and there had been, in fact, no net proceeds whatever from the mine.

*Johnson v. Geddes* (Utah), 161 Pacific, 910, p. 911.

#### ADVERSE POSSESSION—JUDGMENT QUIETING TITLE.

In an action to quiet title to minerals and mineral lands, the judgment of a court of competent jurisdiction settles and determines the title as against a party claiming by adverse possession or otherwise, and a judgment which determines that an adverse claimant is not the owner and forbids him to be such, and enjoins him from using or trespassing upon the land, and concludes his right to hold it adversely; and any adverse possession had or claimed by him before the institution of the suit is extinguished by the judgment. On the rendition of the judgment, it was his duty to give up the possession and to refrain from any other possession of the land or claim to its ownership. Such a judgment breaks the continuity of the possession by the adverse claimant and he can not, in a subsequent suit against the original owner, or his grantee, base a claim of adverse possession where such possession antedates the time of the rendition of such judgment.

*Tennis Coal Co. v. Sacket* (Kentucky), 190 Southwestern, 130, p. 141.

#### TITLE—ADVERSE POSSESSION.

Before a person can acquire an actual possession to coal land to which he had no title, or only as such grounds to claim ownership that merely gives him a color of title, he must enter upon the land with the intention of holding it. If he enters under a deed or other instrument, he will be in actual possession to the extent of his boundaries. The adverse possession necessary to create title must have for its basis the existence of physical facts, such as making improvements upon the land or doing such acts upon it as will openly evince a purpose to hold dominion over it in hostility to the title of the real owner, and such as will give notice to the real owner that the purpose is to hold it in hostility to his title, and such holding must continue for a period of 15 years under the statute of Kentucky.

*Tennis Coal Co. v. Sacket* (Kentucky), 190 Southwestern, 130, p. 135.



**RELIEF FROM FRAUD—FALSE REPRESENTATION.**

The statute of Washington provides that a cause of action for relief on the ground of fraud is not to be deemed to have accrued until the discovery, by the aggrieved parties, of the facts constituting the fraud (Remington Code, 1915, sec. 159). Under this statute a part owner of a mining property who was induced by the fraudulent representations of another part owner to join in the sale of the mining property at a stated price, where the purchaser was, in fact, offering a greater price, and the coowner conducting the negotiations falsely represented that the purchaser would pay no more than the stated price and that he would not deal with any other coowner, is entitled to sue and recover at any time within three years after the discovery of the fraud.

*Langley v. Devlin* (Washington), 163 Pacific, 395, p. 396.

**SURFACE AND MINERALS—OWNERSHIP AND SEVERANCE.****SEPARATION OF SURFACE AND MINERALS—ADVERSE POSSESSION.**

The statute of Kentucky (section 2366a) provides that where the mineral or other interest passed from a claimant in possession of the surface of the land, the continuity of the possession of such mineral interest shall not be deemed thereby to be broken; but the possession of the surface by the original claimant from whom such mineral interest or rights passed shall be deemed to be the possession of the mineral interest for the benefit of the person, or his heirs, to whom the mineral interest shall have passed. Under this statute where the vendor of the coal was in possession of the land at the time of the sale of the coal interest, and therefore remained in possession until the adverse possession of the land was held for the statutory period, counting from the first acquiring actual possession of the land, then the title of his grantee of the coal was made valid. But, if before the statutory period of adverse possession had expired, the original vendor had abandoned possession of the land or had been evicted by the owner of the paramount title, then the title of his grantee, the present claimant, failed.

*Tennis Coal Co. v. Sacket* (Kentucky), 190 Southwestern, 130, p. 141.

**POSSESSION OF MINERAL INTERESTS.**

Section 2326a of the statute of Kentucky provides that the possession of the surface of land shall be deemed the possession of the mineral interests therein, for the protection of the owners of the minerals. But this statute makes no change in the character of the estate of the owners of mining leases, but only protects them, and the leasehold remains personalty notwithstanding the statute, and

does not make members of a partnership holding leases of mining interests joint tenants.

*United Mining Co. v. Morton* (Kentucky), 192 Southwestern, 79, p. 82.

#### RIGHT TO SUPPORT.

Where different strata of earth are owned by different persons and there is no contract or statute which affects their interest, the owner of the upper stratum has an absolute right to have his land supported in its natural position by the stratum below.

*Audo v. Western Coal & Mining Co.* (Kansas), 162 Pacific, 344, p. 346.

#### SUBSIDENCE OF SURFACE—LIABILITY.

A coal-mining company owned a tract of land underlain with coal. The company, after it had mined out and removed the coal from under a part of the land, sold the surface of the entire tract to a purchaser for a valuable consideration and conveyed the same by warranty deed, but reserved to itself the remaining coal and other minerals under the tract with the right to mine and remove the same. The purchaser knew that the coal had been mined from under a part of the premises conveyed but he had no knowledge of the manner in which the coal had been mined nor the adequacy of the supports or pillars to protect the surface. Under such circumstances the right to subjacent support for the surface was not waived by the purchaser but he is entitled to have his land supported in its natural condition, and the deed on its face conveyed the subjacent support for the reason that such support was a part of the real property therein described and there was nothing to indicate that support for the surface above the coal had been withdrawn but the purchaser had the right to assume that such support had been left, and the mere knowledge of the fact that the coal had been mined from a portion of the land does not constitute a waiver of the right to subjacent support conveyed by the deed. Under the deed the grantor, the coal company, was liable to the grantee for damages caused by the subsequent subsidence of the surface.

*Audo v. Western Coal & Mining Co.* (Kansas), 162 Pacific, 344, p. 346.

#### COAL AND COAL LANDS.

##### GENERAL CONTRACT TO SELL COAL—CONSTRUCTION AND COMPENSATION.

A corporation organized for the purpose of selling the products of a number of coal mines, but itself mining no coal, employed a third person "as its sole agent in the matter of the sale of its product within a stated territory." In the construction of this contract the



word "products" was not intended nor understood to mean the entire output of the mines represented. Looking at the contract as a whole the word "product" would appear to mean the coal which was turned over to the selling corporation for sale, or in respect of which the selling corporation in some manner represented the coal companies, but it can not be construed to include as well coal sold by the coal-mining companies themselves and upon which the selling corporation itself received no compensation.

*Gatewood v. New River Consolidated Coal & Coke Co.*, 239 Fed., 65, p. 59.

#### AGREEMENT FOR HAULING COAL—EXCLUSIVE USE.

A firm, as the owner of coal lands and coal mines, agreed with a railroad company that it should put in a side track for them from its main track to their coal mine. It was agreed that the firm should furnish the right of way, do the grading and bridging from the main track to the mine, and pay a part of the first cost of ties. The railroad company was to furnish the material necessary for laying the tracks and to maintain them at its own expense. The consideration for the agreement was that the railroad company was to have exclusive use of the tracks and right of way for its use in handling the business of other industries except coal mines that might be located adjacent to the tracks or reached from this branch road and that it should conduct its business in a manner which would not interfere with the business of the coal firm. From the entire contract and the situation of the parties when the contract was made, it was the intention that the owners of the coal mine were to have a monopoly of the use of the tracks so far as coal-mine products were concerned in return for the large amount of money they expended in its construction, and the railroad company was to have exclusive use of the track or a monopoly of its use for all purposes except coal mines. Under the agreement and the acts of the parties and their construction thereof, and owing to the large amount of money invested by the mine owners in the right of way and railroad tracks, the railroad company has no right, without their consent, to transfer cars of coal from its main line and haul them over the branch line, to the interference of the business of the coal-mine owners.

*Sholl Bros. v. Peoria, etc., Ry. Co.* (Illinois), 114 Northeastern, 529, p. 532.

#### WIDOW'S DOWER IN MINES.

Where mines have been opened in the lifetime of the husband and the right of dower exists, the widow becomes seized of her right and is entitled to dower in mines opened and used during the lifetime of her husband. Where the dower interest can not be assigned by reason of the irregularities in the veins of coal and the premises are of

such nature that dower can not be assigned by metes and bounds, the court may order in lieu of such assignment that the widow be entitled to and receive one-third of the rents and profits of the mines opened and worked from the date of the decree.

*Shupe v. Rainey* (Pennsylvania), 100 Atlantic, 138, p. 141.

ASSIGNMENT BY HUSBAND FOR BENEFIT OF CREDITORS—WIFE'S INTEREST.

The owner of lands containing coal conveyed a certain part of the coal in place by deed in which his wife did not join. Subsequently the husband on his insolvency, by a deed or assignment for the benefit of his creditors, conveyed the surface of the land to an assignee by deed in which the wife joined. The joining of the wife in the deed or assignment in no way affected her interest in the coal previously conveyed by the husband and she still held her dower right in the coal.

*Shupe v. Rainey* (Pennsylvania), 100 Atlantic, 138, p. 139.

CONVEYANCE INCLUDING COAL—BREACH OF COVENANT—DAMAGES.

A deed conveying a tract of land and expressly including three acres of coal, with a general covenant of warranty includes in the covenant coal as well as the land; and the failure of the grantor to deliver the coal, it having been mined out and removed, is a breach of the covenant and entitles the grantee to sue for such breach and recover damages. In such case the measure of damages is the relative value of the coal mined out of the three acres before the plaintiff purchased, as compared with the value of the entire tract estimated with regard to the price fixed by the parties to the deed for the entire purchase; and it is proper for either party to give evidence of the peculiar advantages or disadvantages of the part lost with reference to the whole of the land.

*Clark v. Steele* (Pennsylvania), 99 Atlantic, 1001, p. 1003.

SALE OF COAL IN PLACE—REMOVAL—DAMAGES.

In an action for the breach of a covenant in a deed conveying certain described land and the coal in place under a certain part of the land, where it appeared that the coal had been mined out and removed without the knowledge of the grantee, the burden of proving the relative value of the part to which the title failed as compared with the value of the whole property was on the complainant. He had a right to show also, where it was demonstrated that the practical effect of the removal of the coal would be a subsidence of the surface and consequent injury to buildings, springs, etc., and under such circumstances the grantor is not limited in his damages to the market



value of the coal, but may include the probable damages to buildings, springs, and streams that have ensued or that are likely to ensue from the removal of the coal. Such proof is admissible under a general averment of the resulting damages as these would necessarily follow from the breach of the covenant and was in the contemplation of the parties where it was shown that both were familiar with the general effect on the surface of the removal of underlying coal, including the damage of the subsidence of the surface and consequent injury to buildings, springs, and streams. It will be presumed that the parties had these things in mind when they contracted for the sale of the land with the coal in place under the farm buildings on the premises.

*Clark v. Steele* (Pennsylvania), 99 Atlantic, 1001, p. 1003.

#### SALE OF MINERALS—SUBJACENT SUPPORT—WAIVER.

The right to subjacent support to the surface where land has been sold with the reservation of the underlying coal would not be deemed to have been waived or lost to the owner of the surface unless such clearly appears, from the language used in the conveyance to have been the intention of the parties, as an owner of the surface is entitled to actual absolute support unless that obligation is distinctly removed.

*Audo v. Western Coal & Mining Co.* (Kansas), 162 Pacific, 344, p. 346.

#### OIL AND OIL LANDS.

##### EFFECT OF PRESIDENT'S WITHDRAWAL ORDER.

In the absence of a discovery on an oil location on the public domain and in the absence on the part of the locator of diligent prosecution of work leading to discovery, even though in actual possession of the claim, as against the Government, he is subject at any time to the possibility of a withdrawal of the privileges offered to him and consequently a termination of his rights.

*United States v. McCutchen*, 238 Fed., 575, p. 579.

##### OFFER AND ACCEPTANCE.

The Government by its mining statutes offers to qualified persons the minerals in the public domain through the means of mining locations, and if the offer so made is accepted by compliance and by the location of a valid mining claim in accordance with the statutory provisions before the offer is withdrawn by the Government, it can not, after acceptance, withdraw its order, as the offer then becomes binding and an enforceable obligation. But the Government may withdraw its offer at any time before acceptance and the situation stands as if no offer had ever been made.

*United States v. McCutchen*, 238 Fed., 575, p. 583.

## LANDS VALUABLE FOR OIL.

The act of Congress February 11, 1897 (29 United States Statutes at Large, p. 526), provides that any person authorized to enter land under the mining laws may enter and patent lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the statute relating to placer mineral claims. Congress intentionally limited the right of entry upon and location of oil lands to such lands as were "chiefly valuable therefor," meaning thereby land chiefly valuable for oil. The Government as sovereign proprietor had a right to say what lands might be entered and located for oil. It could deny the right to enter upon any such land and could limit the land upon which entry might be lawfully made; and as to any land not within the category specified in the statute there was no invitation or authorization given to enter them and no right could be obtained as against the Government by so doing.

*United States v. McCutchen*, 238 Fed., 575, p. 583.

## WITHDRAWAL ORDER.

The President's withdrawal order of September 27, 1909, was effective to withdraw from location, entry, exploration, and exploitation land attempted to be located as an oil location, but upon which the locator had made no discovery of oil and was not in a diligent prosecution of work for the purpose of discovery, prior to or at the time of the withdrawal order.

*United States v. McCutchen*, 238 Fed., 575, p. 593.

## CONTRACT OF SALE—CONSTRUCTION—RIGHT OF POSSESSION.

A contract for the sale of certain oil lands provided that the purchaser should not remove nor cause to be removed any of the pipe or casing in any well drilled on the property; and it also provided that in the event of a forfeiture by the purchaser of the right to purchase the land under the contract, the casings and derricks should revert to the vendor. The contract did not in express terms give the purchaser the right of possession of the property, but in view of the wording of the contract and of the subsequent conduct of the parties to the contract, immediate entry by the purchasing company upon the land and the development of oil thereon were within the contemplation of the parties. Such contracts may by implication give the right of immediate possession by the vendee where no express provision to that effect is contained in the contract of sale.

*Francis v. West Virginia Oil Co. (California)*, 162 Pacific, 394, p. 395.



## EMINENT DOMAIN.

### RIGHT OF WAY OVER MINING CLAIM—DAMAGES.

A railroad company appropriated a strip of land for a right of way over a mining claim. The mining company was entitled to recover whatever damages it might suffer by reason of the appropriation of the right of way and the railroad company could not escape liability or mitigate the damages by permitting or offering to permit the mining company to use a part of the appropriated land for dumping purposes.

Bingham, etc., *R. Co. v. North Utah Mining Co.* (Utah), 162 Pacific, 65, p. 68.

### EASEMENTS—USE OF SURFACE.

Whether an easement in connection with mineral land and mining rights is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. If an easement granted is in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there is nothing to show that the parties intended it to be a mere personal right, it will be held to be an easement appurtenant to the land and not in gross. Under this rule where a deed conveyed the minerals in a tract of land with the privilege of using the surface for rights of way for tramways or other means of transportation necessary for the removal of the minerals as well as the minerals from other lands, it will be considered that the minerals so conveyed should be mined or produced in connection with the minerals from other lands, owned or acquired by the grantee and the easement created by the grant of the rights of way will be appurtenant to the grant of the minerals contained in the land, it being reasonably necessary that the minerals in such land should be mined in connection with the minerals from other lands. The grant of such an easement will confer upon the grantee the right to construct a tramroad across the surface of the land containing the minerals granted, for the purpose of hauling timber across the same to be manufactured into lumber to be used in mining the minerals granted, as well as the minerals produced by the grantee from other lands in connection with the minerals so granted.

*Jones v. Island Creek Coal Co.* (West Virginia), 91 Southeastern, 391, p. 393.

### EASEMENT—RIGHT OF WAY FOR HAULING.

The purchaser of coal in place from the owner of the surface, who in connection with the purchase of the coal obtained an ease-

ment over the surface for mining operations both as to the coal purchased and as to coal owned and mined by him in other lands, together with the right to haul or transport lumber manufactured from timber on his lands and used in his mining operations, will not be prohibited from hauling all of such lumber across the land over which he has the easement upon a tramroad constructed by him and he may haul and sell the excess of lumber above that actually needed for mining purposes where this is merely incidental to the main business of producing minerals from his other lands.

Jones v. Island Creek Coal Co. (West Virginia). 91 Southeastern, 391, p. 394.



## MINING TERMS.

### JUDICIAL NOTICE—INSTANCES.

The courts of Kansas take judicial notice of the following mining terms: Air courses are passages for conducting air. Entries are those places in coal mines used by the miners and other workmen generally in going to and from their work and through which coal is hauled from the necks of the rooms to the foot of the shaft. Room is a place in which a miner works and from which he mines coal. Traveling ways are places for the passage of workmen to and from different parts of the mine.

*Ricardo v. Central Coal & Coke Co. (Kansas)*, 163 Pacific, 641, p. 643.

### GIN MEN.

Gin men are persons employed in a mine to clean up and remove fallen slate or rock or other material from the roof.

*North Jellico Coal Co. v. Stewart (Kentucky)*, 191 Southwestern, 451, p. 453.

### JACK POLE.

A jack pole is an iron rod or pole sharpened at each end and one end is inserted in the roof and the other in the floor of the mine in notches made for this purpose. A wire cable runs from the jack pole to the coal cutting machine and the pole operates as a stay to hold the machine in place during its operation, and by reason of the weight and the force necessary to run the coal cutting machine the jack pole and the wire cable are subjected to a strain of something like 4,000 pounds.

*Tennessee Coal, Iron & Railway Co. v. Wiggins (Alabama)*, 73 Southern, 516, p. 517.

### MACHINE HELPER.

A machine helper is a man who assists a machine runner and his duty is to set up and hold the iron rod or jack pole which runs a wire cable to the machine, and he is subject to the orders of the machine runner.

*Tennessee Coal, Iron & Railway Co. v. Wiggins (Alabama)*, 73 Southern, 516, p. 517.

### MACHINE RUNNER.

A machine runner is a man who operates the levers which control the electric power driving a coal cutting machine and he determines the movements of the machine while in operation.

*Tennessee Coal, Iron & Railway Co. v. Wiggins (Alabama)*, 73 Southern, 516, p. 517.

## MINE.

Under the Alabama code the term "mine" applies alike to ore and coal mines.

*Sloss-Sheffield Steel & Iron Co. v. Bearden* (Alabama), 74 Southern, 230, p. 231.

## SOLLERS.

Sollers are intermediate platforms between the levels in a ladderway, the purpose of which is to stop anything falling through the ladderway, or to catch a man's body in case he falls.

*Drajicevic v. Champion Copper* (Michigan), 160 Northwestern, 451.



## MINING CORPORATIONS.

### BANKRUPTCY—SALE OF PROPERTY—RIGHTS OF STOCKHOLDERS.

Where the property of a bankrupt mining corporation was sold on foreclosure proceedings, the referee may properly refuse to confirm the sale, where between the time of the sale and confirmation it was shown that the property had greatly appreciated in value and was then worth more than sufficient to pay all the debts of the corporation. Under such circumstances it is proper to give the stockholders time to form a committee to purchase the property under an order providing that no stockholders' committee should be allowed to bid except upon the condition that all the indebtedness and administrative expenses should be paid, but making the sale competitive and authorizing the property to be sold to the committee or person bidding the highest figure.

Ohio Copper Mining Co., In re, 237 Fed., 490, p. 493.

### POWER TO ENCUMBER MINING PROPERTY.

The statute of Colorado (R. S. 1908, sec. 865) prohibits manufacturing corporations from encumbering their mining property, or the principal machinery incident to the production, unless approved by a majority of the stockholders. Under this statute a lease is held to be an encumbrance and a lease of mining property made by a mining corporation without a legal vote of the majority of the stockholders approving it is voidable by the stockholders, and the right of action to avoid it is in them and not in the corporation.

Elder v. Western Mining Co., 237 Fed., 966, p. 971.

### POWER TO ENCUMBER PROPERTY—WANT OF VALIDATION BY STOCKHOLDERS.

A statute prohibiting a mining corporation from encumbering its property without the consent of a majority of the stockholders can not be construed to make valid a lease made by the directors until it has been repudiated by a majority of the stockholders; but until a lease has been submitted at a proper and legal meeting of the stockholders and a majority of all the shares of stock have voted in favor of the lease, the lease is voidable by any stockholder and any such stockholder may maintain a suit to set it aside without the assent of the majority of the stockholders or of any stockholder other than himself to a repudiation of the lease.

Elder v. Western Mining Co., 237 Fed., 966, p. 973.

## AUTHORITY OF PRESIDENT.

The president of an oil company has no power ordinarily to render the company liable by the execution of a note in its name payable to himself; but where the by-laws of the corporation give its president and treasurer authority to sign such notes as he might find necessary for the procurement of funds for the corporation, and resolutions of the directors were passed from time to time authorizing the president and treasurer to borrow for the use of the corporation such funds as he thought necessary, this constitutes such conduct on the part of the corporation and its officers as to give authority to the president to borrow from himself as well as others and to execute notes of the corporation to himself for the loans made. The knowledge of the corporation of the acts of the president in borrowing money from himself and executing the notes of the corporation therefor and the use of the money so borrowed on the authority of the directors constitute a complete ratification of the acts of the president and renders the corporation liable on such a note.

Eastman Oil Co., *In re*, 238 Fed., 416, p. 418.

## INSOLVENCY—DISTRIBUTION—INTEREST.

Where a mining corporation is insolvent and all the claims are of equal dignity, the dividend and distribution are made upon the basis of the amount of principal due at the time the property passed into the hands of the court; but where there are claims of different classes or rank and no class or rank is secured by mortgage of real estate the mortgagee is entitled to the principal and to the interest that accrues up to the time of the satisfaction, although in the distribution nonlien creditors may receive no dividend whatever.

Spring Coal Co. *v.* Keech, 239 Fed., 48, p. 53.

## AUTHORITY OF DIRECTOR.

The director of a mining corporation has no authority by virtue of his office to make a mortgage disposing of all of the corporation's property and disabling it from carrying on its business in the absence of any previous exercise of such authority or custom or the holding out of him by the corporation as having such authority.

Danglade & Robinson Mining Co. *v.* Mexico-Joplin Land Co. (Missouri App.), 190 Southwestern, 35, p. 37.

## AUTHORITY OF GENERAL MANAGER.

A director of a mining corporation who was elected "to manage the mining interests and property of the company," but whose business as such manager was confined to the physical management of the property and the carrying on of the mining operations, and who as

treasurer had the right to collect in money belonging to the corporation and to disburse the same, including the payment of debts, has no implied authority to mortgage or pledge the machinery of the corporation to pay or secure a debt of the corporation.

*Danglade & Robinson Mining Co. v. Mexico-Joplin Land Co.* (Missouri App.), 190 Southwestern, 35, p. 37.

#### MORTGAGE TO SECURE DEBT—CONVERSION—SET-OFF.

A director and general manager of a mining corporation without authority executed a mortgage on certain mining machinery to secure the debt of the company due and owing as royalty on the ore mined. In an action by the mining company against the mortgagee and creditor for conversion of the mining property, it was held by the court that the mining company's debt was so closely connected with the creditor and mortgagee's conversion of the property that the one should be set-off against the other, and that the mining company should recover the difference only between the debt and the reasonable value of the property converted.

*Danglade & Robinson Mining Co. v. Mexico-Joplin Land Co.* (Missouri App.), 190 Southwestern, 35, p. 38.

#### INSURABLE INTERESTS IN MINING PROPERTY—JUDGMENT LIENS.

A mining corporation purchased certain mining property subject to the lien of a judgment taken against the seller. The mining company as such purchaser had an insurable interest in the property and caused the same to be insured for its benefit. On the destruction of the property by fire, on the collection of the insurance money by the purchasing corporation, the fund thus derived from the insurance was not subject to the lien of the judgment and did not stand in its stead, and when the property was destroyed the security for the judgment was wiped out.

*Vogelstein v. Athletic Mining Co.* (Missouri App.), 192 Southwestern, 760, p. 763.

#### LIABILITY ON PURCHASE OF MINING PROPERTY.

A mining corporation by merely purchasing material and machinery of another company does not assume any liability under a judgment rendered against the selling company and to which the purchasing company was not a party except that it takes the fixtures and property subject to the judgment lien. The judgment creditor under such circumstances can proceed only against the property.

*Vogelstein v. Athletic Mining Co.* (Missouri App.), 192 Southwestern, 760, p. 763.

#### STATUTE MAKING REMOVAL A CRIME—VALIDITY.

The statute of Arizona (Civil Code Arizona, 1913, par. 2228) attempting to prevent the removal of a suit from a State court to a



Federal court by a foreign corporation by making an attempt to so remove a case a misdemeanor is unconstitutional and void.

*Copper Queen Consolidated Mining Co. v. Jones*, 237 Fed., 131, p. 136.

See *Deutsch v. Alaska-Gastineau Mining Co.*, 237 Fed., 215.

See *Key v. West Kentucky Coal Co.*, 237 Fed., 258.

#### MATTERS DETERMINED ON PETITION FOR REMOVAL.

In a proceeding on the part of a mining corporation to remove a cause from a State court or to remand to a State court an action removed to a Federal court, the question whether the facts are properly pleaded or sufficiently pleaded to constitute a cause of action is not for the court to determine upon the hearing.

*Deutsch v. Alaska-Gastineau Mining Co.*, 237 Fed., 215, p. 218.

See *Copper Queen Consolidated Mining Co. v. Jones*, 237 Fed., 131, p. 135.

*Key v. West Kentucky Coal Co.*, 237 Fed., 258.

#### PETITION AND BOND OPERATE AS REMOVAL—WAIVER.

When a petition for the removal of a case is sufficient, on the filing of proper bond by a mining corporation in an action in a State court, no order of the court removing the case to a Federal court is necessary, as the filing of the petition and the giving of the bond, ipso facto, removes the case. A defendant mining company loses none of its rights by following the case in the State court after the proper petition and bond have been filed and removal denied.

*Nelson v. Black Diamond Mining Co.*, 237 Fed., 264, p. 266.

#### REMOVAL—FILING SECOND PETITION.

The removal statutes do not authorize or permit the filing of a second petition for removal except where, before a trial on the merits, the plaintiff changes the parties by a dismissal of the local defendant, or where before or even during the trial the plaintiff amends his pleading and thereby increases the amount in controversy to a sum exceeding \$3,000, exclusive of interest and costs, or where the plaintiff does some other things analogous to these mentioned.

*Key v. West Kentucky Coal Co.*, 237 Fed., 258, p. 263.

#### REMOVAL—SEPARABLE CONTROVERSIES.

In an action by a miner against a mining corporation and its managing agent for injuries received by the alleged negligence of such managing agent, there is no separable controversy as the parties defending are properly joined and there can be no removal of the case from a State to a Federal court on that ground.

*Key v. West Kentucky Coal Co.*, 237 Fed., 258, p. 261.

See *Deutsch v. Alaska-Gastineau Mining Co.*, 237 Fed., 215.

*Nelson v. Black Diamond Mining Co.*, 237 Fed., 264.

.      **LIABILITY FOR ATTORNEY FEES.**

A mining corporation is liable for the fees and services of an attorney employed by the promoters of the corporation before the certificate of incorporation was filed, but where the employment was made after the articles of incorporation had been executed and the directors named therein were present and for several years thereafter the same members continued to fill the positions as directors for the company and where the services were rendered after the corporation was organized and the certificate duly filed and recorded.

*Expansion Gold Mining & Land Co. v. Campbell* (Colorado), 163 Pacific, 968, p. 970.

## MINING PARTNERSHIPS.

### NATURE.

A mining partnership to which the parties do not by contract give the ordinary incidents of commercial partnerships is distinguishable from the ordinary commercial or trading partnership in characteristics which flow from the fact that in mining partnerships there is no *delectus personae* except as to the few peculiarities which depend upon this distinction. The law governing a mining partnership is not different from that applicable to a commercial partnership, and the elements of the latter are common also to the former.

*United Mining Co. v. Morton* (Kentucky), 192 Southwestern, 79, p. 83.

### EXPLORING OIL TERRITORY.

A partnership formed for the purpose of engaging in exploring prospective oil territory is not a mining partnership as defined by the statute of California (Civil Code, sec. 2511), where the members are associated together for the purpose of working a mining claim.

*Callahan v. Danziger* (California App.), 163 Pacific, 65, p. 67.

### CONTRACT FOR OPERATING MINE.

A contract under which the owners of mineral lands and a mining company agreed to operate them is in the nature of a partnership agreement where, instead of the usual royalties, the lease prescribed the mode in which the mine is to be worked by controlling the salaries of the officers and the operating expenses, and providing that the mine should be operated in a certain stated manner and that the owners of the land were to receive at stated intervals each year "as in the nature of royalties 40 per cent of the net profits." This manner of paying for the privilege of mining is not essentially different from paying a certain amount for each ton taken out, and the amounts received under the agreement should be held to be rents and profits from the land.

*Pettit's Estate, In re* (Minnesota), 161 Northwestern, 158, p. 161.

### CONSTRUCTION OF CONTRACT—PRACTICAL CONSTRUCTION.

The parties to a contract are supposed to know best what they mean, and if in reducing it to writing, words or terms were used that rendered the contract ambiguous or uncertain, then the construction by the parties as shown by their acceptance and acts thereunder can be of value in aiding the court in ascertaining the true intention and



meaning of the instrument, and the construction placed upon the contract by the parties themselves should be upheld by the courts.

*Sholl Bros. v. Peoria, etc., Ry. Co. (Illinois), 114 Northeastern, 529, p. 531.*

#### ORAL CONTRACT—STATUTE OF FRAUDS.

Two persons orally formed an equal partnership for the purpose of taking mining options and leases and acquiring and developing mining rights and holdings in certain counties in Kentucky. A partnership agreement to deal in mining leases is an agreement relating to personal property and not to real estate, as leaseholds are personalty, and such an agreement resting in parol is not within the statute of frauds.

*United Mining Co. v. Morton (Kentucky), 192 Southwestern, 79, p. 82.*

#### DEALING IN REAL ESTATE.

There is nothing in the nature of mining which forbids the creation of a partnership by an ordinary partnership contract which would draw to the relation of the parties the incidents of a trading partnership and destroy the distinctions which are based upon the non-existence of the *delectus personae* in strict mining partnerships. A mining partnership agreement made by parol, although it necessarily required the acquisition of an interest in land, may be implied from the acts of those sought to be charged as partners.

*United Mining Co. v. Morton (Kentucky), 192 Southwestern, 79, p. 83.*

#### ABANDONMENT.

One partner in a mining partnership agreed to devote his entire time to the partnership business. Subsequently he left the State, but returned once at the expense of the other partner, and thereafter for a period of at least five years paid no attention whatever to the partnership business and did not even inform his partner of his whereabouts. This was a complete abandonment of the partnership business. On such abandonment the other partner is necessarily left to the management of the partnership business and may surrender mining leases, or he may make a general assignment for the benefit of the firm's creditors.

*United Mining Co. v. Morton (Kentucky), 192 Southwestern, 79, p. 83.*

#### PARTNERSHIP AGREEMENTS.

A partnership formed for the purpose of dealing in mining leases does not constitute the members cotenants in the leases acquired, and one partner in such a partnership may sell and assign a mining lease acquired by the firm and thereby bind his partner and the partnership.

*United Mining Co. v. Morton (Kentucky), 192 Southwestern, 79, p. 83.*

## CREATION OF PARTNERSHIP RELATIONS.

A partnership relation between parties engaged in acquiring mining properties for their joint benefit must exist at the time such properties are acquired by one of the parties to such an arrangement in order to entitle the other to an interest therein.

Hollingsworth *v.* Tufts (Colorado), 162 Pacific, 155, p. 159.

## INTEREST IN PROPERTY.

A person claiming an interest in mining property as a partner under an agreement that mining property discovered and located should be held and owned by the partners must show that the mining property in which he is seeking to establish an interest was discovered and located under and pursuant to the partnership agreement.

Hollingsworth *v.* Tufts (Colorado), 162 Pacific, 155, p. 159.

## MONOPOLY AGREEMENT WITH RAILROAD.

An agreement between a partnership owning coal land and coal mines and a railroad company whereby the owners of the coal land and coal mines, by reason of their contributions and aid in the construction of a railroad over their own lands, was to have a monopoly of the road as to the matter of hauling and transporting coal, is not contrary to public policy and void, as the side track or branch road contemplated is not a part of the public railroad system of the company and could not become a part thereof, unless it bought, purchased, or acquired the same by condemnation proceedings.

Sholl Bros. *v.* Peoria, etc., Ry. Co. (Illinois), 114 Northeastern, 529, p. 532.

## MINING CLAIMS.

### NATURE AND GENERAL FEATURES.

#### RIGHTS AND INTERESTS.

A prospector who was under a grubstake contract to locate mining claims, in company with another prospector who was under a grubstake contract from another party to locate mining claims, located different claims for their respective principals. A letter written by one of the prospectors to his principal to the effect that "we discovered and located" certain mentioned claims is not sufficient proof to show that the principal of the prospector who wrote the letter had an interest in a particular claim located by the second prospector in the name of his principal. The statement that "we discovered and located" is not inconsistent with the theory that he merely assisted the other grubstake prospector in locating the claim. The fact that the writer did assist the other prospector and in fact wrote the location notice and witnessed and recorded the same will not, of itself, subject the location to the grubstake contract entered into with him.

*Turner v. Wells*, 238 Fed., 766, p. 769.

#### NATURE AS REAL PROPERTY—ORAL AGREEMENTS.

The statute of Oregon (sec. 5132 L. O. L.) provides that a mining claim shall be deemed real property, and it follows as a corollary that an enforceable interest in a mining claim can not be created by a verbal option.

*Grand Prize Hydraulic Mines v. Boswell* (Oregon), 162 Pacific, 1063, p. 1067.

#### ASSISTING IN LOCATION—ESTOPPEL.

A miner and prospector who went upon and prospected and made some development of a tract of land, and who subsequently assisted another miner and prospector in surveying and laying off and staking another claim, is estopped from asserting title or right to such later claim after the discovery of valuable minerals thereon, on the ground that the discovery point and the part of the claim surrounding such point was located within the limits of the ground claimed by him. The same rule of estoppel applies to the son of the first locator, who, in the matter of making the second location, was present and acquiesced in all that his father did and who knew that the work of such second locator was done within the boundaries of the original claim taken or staked by his father.

*Grand Prize Hydraulic Mines v. Boswell* (Oregon), 162 Pacific, 1063, p. 1066.



**VEIN OR LODE.****VEIN—WHAT CONSTITUTES.**

A vein or lode comes within the meaning of the United States mining statutes so long as there is a fissure or gouge or any evidence of mineralization which will lead a practical miner from one ore body to another and which does in the course of his work so lead him.

*Almeda Mining Co. v. Success Mining Co. (Idaho)*, 161 Pacific, 862, p. 865.

**LODE—WHAT CONSTITUTES.**

Tilted beds of sedimentary strata containing ore would by the geologist be called beds and not lodes; but the intent of the United States mining statutes is not to make distinctions based upon genetic principles. What the geologist might call beds of ore the courts may find to be lodes within the meaning of the United States mining statutes authorizing the location of mining claims upon the public domain.

*Alameda Mining Co. v. Success Mining Co. (Idaho)*, 161 Pacific, 862, p. 865.

**APEX OF VEIN.****TERMINAL EDGE OF VEIN.**

An apex is the top or terminal edge of a vein on the surface or the nearest point to the surface, and must be the top of the vein proper, rather than of a spur, and must be a point from which the vein has a dip as well as a strike.

*Alameda Mining Co. v. Success Mining Co. (Idaho)*, 161 Pacific, 862, p. 865.

**DISCOVERY.****NO RIGHTS ACQUIRED WITHOUT DISCOVERY.**

A person who enters upon the public domain and locates land for its mineral contents, as oil lands, though he may erect appropriate monuments and post and properly file location notices, if he makes no discovery of minerals or oil, he acquires no right of any nature against the Government or any private individual, save the right to proceed with diligence to effect an actual discovery of minerals, gas, or oil.

*United States v. McCutchen*, 238 Fed., 575, p. 579.

**STATUS IN ABSENCE OF DISCOVERY.**

The status of a locator of a mining claim in the absence of a discovery is in the nature of a tenant at sufferance.

*United States v. McCutchen*, 238 Fed., 575, p. 580.

**MARKING BOUNDARIES.****COMPLIANCE WITH STATUTE.**

As against a subsequent locator who has actual knowledge of the existence of a mining claim and who had assisted in performing the assessment work for the year previous to his attempted relocation, it is sufficient that the original location was distinctly marked on the ground so that its boundaries could be readily traced.

*Gold Creek Antimony Mines & Smelter Co. v. Perry* (Washington), 162 Pacific, 996, p. 999.

**MARKING BOUNDARIES UPON THE GROUND.**

The United States mining statutes (R. S. 2324) require a location to be distinctly marked upon the ground, with the name of the locator, the date of location and such references to natural objects or permanent monuments as will identify the claim. These provisions are supplemented by the statute of Washington (Remington Code, sec. 7379). The purpose of the United States statute and of the State statute is to give notice to prospectors who are looking for mineral locations of what has been already appropriated in order that they may govern themselves accordingly. It is also the purpose to prevent fraud by swinging or floating. In accomplishing these purposes, courts are inclined to be liberal with persons making mining locations, and are not inclined to defeat a claim of a locator who has in good faith attempted to comply with the requirements of the law by technical criticism of the act relied upon to constitute a valid location.

*Gold Creek Antimony Mines & Smelter Co. v. Perry* (Washington), 162 Pacific, 996, p. 997.

**DESCRIPTION.****SURVEY—MONUMENTS CONTROL DISTANCE.**

Where mining claims were actually surveyed out on the ground and the four corners established and if in the application of descriptions in the patent to the claims as surveyed, a latent ambiguity arises in that a distance called for conflicted with the corners as established for the mining claims, then the mining claim's corners as fixed control the call for distance as given in the patent and the distance called must yield to the established corners of the claims.

*Plummer v. McLain* (Texas Civil App.), 192 Southwestern, 571, p. 575.

**ASSESSMENT WORK.****TIME OF PERFORMANCE—RESUMING WORK.**

The United States mining statutes (sec. 2324) require that all locators of mining claims perform \$100 worth of work during each year to entitle them to hold the claim as against a relocater. After the year in which a location is made the entire assessment work must be performed during each year and must be completed within each

calendar year, or a third person may enter and relocate the claim, unless the locator has resumed work after his failure to complete the same before a relocation is made. If a locator or owner has begun the assessment work before the expiration of any given year and is carrying on to completion such work the claim is not subject to relocation, although the locator or owner is not on a particular day upon the claim at work.

*Plough v. Nelson* (Utah), 161 Pacific, 1134.

#### PROOF OF FAILURE TO PERFORM ASSESSMENT WORK.

A person who has been acquainted with a mining location for years, familiar with its workings, and who assisted in doing the assessment work for the previous year, must make a strong case of failure of the prior locator to perform the annual assessment work before he can be heard to say the ground was vacant and unoccupied and subject to relocation by him.

*Gold Creek Antimony Mines & Smelter Co. v. Perry* (Washington), 162 Pacific, 996, p. 997.

#### EXTRALATERAL RIGHTS.

##### TERMINATION OF VEIN.

The fact that a vein terminates against a granite or monzonite at one end does not affect the extralateral rights given by the provisions of section 2322 of the United States Revised Statutes. Where a vein so terminates the locator would be entitled to have the end line pass through such point of termination parallel with the vertical plane of the other end line, thus giving him the extralateral right of the pursuit of the vein between the planes bounded by these end lines beneath all other mining claims under which it dips.

*Alameda Mining Co. v. Success Mining Co.* (Idaho), 161 Pacific, 862, p. 865.

##### BASES—RIGHT TO FOLLOW VEIN.

The provisions of section 2322, United States Revised Statutes, is determined by the apex on the surface upon which the prospector makes his location and the dip of the vein, and not upon the levels in the depth of the earth opened and disclosed in the working of the mine.

*Alameda Mining Co. v. Success Mining Co.* (Idaho), 161 Pacific, 862, p. 866.

##### COURSE OF VEIN.

The course of a vein is not determined by its direction at any single given point where the vein is a crooked one. A locator's extralateral rights must be determined by the course of the vein at its apex at the surface of the claim. The most practical rule is to



regard the course of the vein as that which is indicated by the surface outcropping or surface exploration and workings. The lower levels of a mine frequently show a different direction of the vein from that which guided the miner in making his location and are at variance with conditions shown in openings nearest to the surface.

*Alameda Mining Co. v. Success Mining Co. (Idaho)*, 161 Pacific, 862, p. 866.

#### EXPERT AND POSITIVE TESTIMONY.

The positive testimony of miners who mined the ore and developed the mine and the engineers and others who made actual surveys of the mine involved in a controversy as to extralateral rights must be taken for more than the speculative theories of experts on the geology and formation of ore bodies and the mineralization of veins. Physical facts should be given greater weight than mere expert opinion and speculative theories.

*Alameda Mining Co. v. Success Mining Co. (Idaho)*, 161 Pacific, 862, p. 868.

#### RELOCATION.

##### KNOWLEDGE OF PRIOR LOCATION—RIGHTS OF RELOCATOR.

A relocater can not base his right to make a valid relocation of an existing mining claim on the ground of the insufficiency of the original location notice, where he was not deceived or misled by any false or deficient description and where it plainly appears that he knew the boundaries of the original claim and entered within them for the purpose of acquiring for himself the benefit of the prior locator's labor and expenditures, believing that such prior locator had forfeited his rights, not in ignorance of such rights or for want of sufficient description of the property in the location notice. The purpose of a description in a location notice is to give notice of the location and where a relocater has actual notice he is not in a position to complain of technical defects which in no way affect his rights.

*Gold Creek Antimony Mines & Smelter Co. v. Perry (Washington)*, 162 Pacific, 996, p. 997.

##### RELOCATION AS ABANDONED PROPERTY—NOTICE.

The statute of Washington (Remington Code, sec. 7365) requires the notice of relocation of a mining claim to state if the whole or any part of the new location is located as abandoned property. A relocater who makes his relocation upon ground known to be embraced in a former location, basing his right upon the fact that his location is made upon vacant and unoccupied ground and because of the failure of the prior locator to perform the annual assessment work, can not uphold the validity of such relocation because of the failure to comply with the State statute.

*Gold Creek Antimony Mines & Smelter Co. v. Perry (Washington)*, 162 Pacific, 996, p. 998.

## VACANT AND UNOCCUPIED GROUND—NOTICE.

A person with knowledge of the boundaries of an existing mining claim and with knowledge that the annual assessment work for the previous year had not been performed can not make a relocation on the theory that the ground is vacant and unoccupied, in the face of the statute of Washington (Remington Code, sec. 7365), which requires a relocation notice to state that the whole or any part of such new location is located as abandoned property.

Gold Creek Antimony Mines & Smelter Co. v. Perry (Washington), 162 Pacific, 996, p. 998.

## POSSESSORY RIGHTS.

## LOCATION AND DISCOVERY ESSENTIAL.

Possession and enjoyment of mining claims under the United States mining statutes depend upon location and discovery of valuable minerals therein.

United States v. McCutchen, 238 Fed., 575, p. 579.

## RIGHTS OF LOCATOR WITHOUT DISCOVERY.

A person after the location of a mining claim on the surface of the public domain may remain out of possession of the land and may await developments either by himself or of others on adjoining or in regional parcels, with no risk other than that of being dispossessed by the Government or some other locator. If this is not done he may return at some considerable period thereafter, or at any time prior to a location by another or to an actual withdrawal by the Government, and proceed to prosecute with diligence his search for minerals; and if he does so return and begins the work of discovery during the time he may be in possession actually engaged in the diligent prosecution of work leading to a discovery, he will be protected against inroads upon his right asserted either by the Government or by private parties, and if he ever actually effects a discovery of mineral, his vested right to the possession and enjoyment of the property and of its mineral contents may, in so far as may be necessary to secure protection to his rights, relate back to the time of his original location and will continue in the future for such time as he may comply with all valid laws and mining regulations. He is under such circumstances in the position of one who having made a discovery of minerals upon unappropriated public land has perfected the location thereof in the strictest sense of the term, and is thereafter subject to all the obligations and possessed of all the privileges of one in possession of a valid and subsisting mining claim.

United States v. McCutchen, 238 Fed., 575, p. 579.

## ACTION TO RECOVER—STATUTE OF LIMITATIONS.

An action to recover a mining claim sold at an invalid tax sale must, under the present statutes of Nevada, be brought within two years from the time the right of action accrues, unless the person entitled to sue is under a statutory disability, and in such case the person has two years within which to bring the suit after the removal of the disability. This rule applies to patented and unpatented mining claims alike. The rule as stated is that "actions for the recovery of mining claims, or for the recovery of the possession thereof, must be commenced within two years from the time at which the plaintiff or those through or from whom he claims were seized or possessed of such mining claim, whether the same be patented or unpatented."

*Wren v. Dickson* (Nevada), 161 Pacific, 722, p. 736, December, 1916.

## ASSIGNMENT—RIGHT OF ASSIGNEE.

The assignee of a mining claim can assert no right or title superior to that of his assignor, unless he was an innocent purchaser for value.

*Grand Prize Hydraulic Mines v. Boswell* (Oregon), 162 Pacific, 1063, p. 1067.

## LOCATION ON STATE LANDS.

The right to locate a mining claim on lands owned by the State of Oregon is granted in order to facilitate the advantageous sale of the land. The locator of a mining claim on State lands acquires only a temporary possessory right, subject to be divested by a failure to purchase or lease the property in accordance with such reasonable regulations as the State land board may prescribe.

*Grand Prize Hydraulic Mines v. Boswell* (Oregon), 162 Pacific, 1063, p. 1064.

## ADVERSE CLAIM.

## ABANDONMENT OF APPLICATION—EFFECT OF JUDGMENT.

After the filing of an adverse claim the applicant for patent withdrew his application and offered no evidence in opposition to the adverse claim. Upon instructions by the court the jury returned a verdict for the plaintiff and a judgment was entered accordingly. The judgment was simply for possession and not to form a basis for patent for the ground in conflict. By the withdrawal upon the part of the applicant of his application for patent the Government could have no further interest in the result of the suit, as title to the ground in conflict was not to be finally determined as a result of the verdict and judgment, and the action therefore became one merely for the right of possession for that part of the premises in conflict. But if the proof fails to disclose a conflict between the locations, the adverse



claimant can only claim such territory as is included within the boundaries defined by his location certificate and as there is no conflict he is not entitled to a judgment.

*Lucky Four Gold Mining Co. v. Bacon* (Colorado), 163 Pacific, 862, p. 863.

### PATENTS.

#### COLLATERAL ATTACK.

A patent for a mining claim is not subject to collateral attack on the ground that the application for patent showed that the tract of land, or the claim patented, did not contain any of the valuable minerals.

*Plummer v. McLain* (Texas Civil App.), 192 Southwestern, 571, p. 577.

### TUNNEL LOCATION.

#### DUMPING MATERIAL ON MINING CLAIM.

A tunnel claimant in the construction of his tunnel has originally no right to dump the waste rock and débris taken from his tunnel in the construction thereof upon the surface of another mining claim. In order to sustain the right as an implication that the law gives to him, he must show that the situation is such that he could not obtain without unreasonable labor and expense any other place or way to dump the material, and that he could not at an outlay of an amount that is within reason obtain dumping privileges elsewhere in the operation of the tunnel.

*Himrod v. Fort Pitt Mining & Milling Co.*, 238 Fed., 746, p. 748.

### ADVERSE POSSESSION.

The original locators of a mining claim constructed and used a tunnel in connection with the operation of the claim. The locator ceased using the tunnel for any purpose and abandoned the same in 1880. In 1887 another person took possession of the tunnel and constructed a flume or conduit therein to conduct the water therefrom for domestic purposes and erected obstructions or bars at the mouth or portal of the tunnel by which all other persons were entirely excluded from the use of the tunnel, and for more than 29 years the tunnel has been so used to the exclusion of all other persons. Such open, notorious, and exclusive possession and use of the tunnel for such a length of time was sufficient to give the person in possession title to the tunnel as against a grantee or assignee of the original locator and constructor.

*Wall v. United States Mining Co.*, 239 Fed., 90, p. 92.

## OIL LOCATION.

## DISCOVERY ON OIL LOCATIONS.

With respect to oil lands arising out of the necessities of the case, discovery may and often must follow location, but upon discovery when ever attained in the absence of intervening rights of a superior nature, the same rights and results flow as if the discovery had preceded location, and pending discovery, the locator, after location, possesses all of the substantial rights consequent upon a discovery itself, as long as he continuously engages himself diligently in searching for oil upon the claim.

*United States v. McCutchen*, 238 Fed., 575, p. 579.

## DELAY IN DISCOVERY—RELATION.

A valid location of an oil claim was made in 1900, and was not void because in fraud of the Government's general mineral land policy; but no discovery was made until 1909 when a valid discovery of oil was made by the locator. In the absence of any intervening location rendered valid by the discovery or by prosecution of diligent work, the discovery in 1909 would confer upon the locator the vested status of a true locator of mineral land. If the locator possessed that status in 1909 and thereafter conformed to and complied with the law, no act of the Government, short of proceedings in eminent domain, could deprive him of his right of property and he could not be subjected to the provisions of a subsequent withdrawal order of whatever source or authority.

*United States v. McCutchen*, 238 Fed., 575, p. 580.

## DISTINCTION BETWEEN OIL AND PLACER LOCATIONS.

The act of 1897 gives a right to enter on lands that are "chiefly valuable" for oil. Section 2319 of the Revised Statutes recites that all valuable mineral deposits are open to exploration and purchase and the land in which they are found to location and purchase. As to lode and placer claims the right is given to explore and purchase "valuable mineral deposits" and the land in which they are found but with respect to oil, the right is given only to enter and obtain patent to lands which not only obtain oil, but which are "chiefly valuable therefor." In one case the value of the "deposits" is the criterion and in the other it is the value of the land, and this principle is not to be lost sight of in defining what will suffice for a discovery under the oil statute.

*United States v. McCutchen*, 238 Fed., 575, p. 583.

## LIBERAL CONSTRUCTION OF STATUTE.

What constitutes discovery in its broad and comprehensive sense is the doing or the accomplishing of that thing with respect to the land sought to be appropriated which serves to impress upon it the quality of being land which is open to exploration or appropriation in the manner and pursuant to the law. Both judicial and departmental rulings have evinced a disposition to be liberal toward locators in the matter of the requirements as to what will suffice to constitute such discovery as to segregate the land sought to be selected from the public domain, and invest it with the attribute of mineral land, and subject it to private ownership or exploitation. If the locator has made such a location or a discovery upon certain defined land as to invest him with a right of property therein, he has made such location and discovery as to entitle him to a patent as against the Government. Conversely, if he has not made such discovery as to entitle him to a patent as against the Government, then he has made no such discovery as to vest him with rights in and to the property. The encountering by a locator in abandoned oil wells drilled by others of a small quantity of gas, both because of its inconsequence, nature, and extent, and also because of the fact that it was not, until after suit was brought, relied upon as a discovery validating the claim, can not, as a matter of law, authorize the court to adjudge that such encounter of gas sufficed to segregate the land in question from the unappropriated public domain prior to the withdrawal order of September 27, 1909.

United States v. McCutchen, 238 Fed., 575, pp. 584-593.



## STATUTES RELATING TO MINING OPERATIONS.

### CONSTRUCTION, VALIDITY, AND EFFECT.

#### COAL AND ORE MINES—EMPLOYMENT OF BOYS.

Section 1035 of the Alabama Code of 1907 applies to ore as well as coal mines but a distinction is made as to the prohibited employment of boys under 14 years of age in surface and underground mines, and the prohibition does not apply to an ore mine worked wholly from the surface.

*Sloss-Sheffield Steel & Iron Co. v. Bearden*, (Alabama), 74 Southern, 230, p. 231.

#### MEANING OF WORD "MINE."

The word "mine" is omitted from sections 1 and 2, Chapter 60, Acts of 1911 (West Virginia Code of 1913, secs. 530-531), amending Chapter 11 of the act of 1887, Chapter 15, Acts of 1891, and Chapter 75, Acts of 1905, as one of the places where minors of the prohibited age are not permitted to be employed, is not covered by any of the other places enumerated in the act and can not be restored by judicial construction.

*Rhode v. J. B. B. Coal Co.* (West Virginia), 90 Southeastern, 796, p. 797.

#### JUDICIAL NOTICE—PARTS OF MINE.

The courts of Kansas take judicial notice of the manner, largely regulated by statute, in which a coal mine in southeastern Kansas is operated under the shaft, entry, room-and-pillar plan or system and applying such matters in the construction of the statutes, the court must reach the following conclusions: Air courses are passages for conducting air. Entries are those places in coal mines used by the miners and other workmen generally in going to and from their work and through which coal is hauled from the necks of the rooms to the foot of the shaft. A room is a place in which a miner works and from which he mines coal. Traveling ways are places for the passage of workmen to and from different parts of a mine.

*Ricardo v. Central Coal & Coke Co.* (Kansas), 163 Pacific, 641, p. 643.

#### APPLICATION OF TERMS—QUESTION OF LAW.

The terms "room," "entry," "traveling way," and a number of others are used in the Kansas statute relating to the mining operations and must have definite and fixed meanings applicable in all situations where the shaft, entry, room-and-pillar system of mining is carried on. Accordingly when a place in a mine is definitely described and its relation to the other parts of the mine is fixed and certain, as

being a place in a room, an entry, an air passage, or a traveling way, it is a question of law for the court to determine whether such place is or is not in a traveling way.

*Ricardo v. Central Coal & Coke Co. (Kansas)*, 163 Pacific, 641, p. 643.

### DUTIES IMPOSED ON OPERATOR.

#### DUTY OF INSPECTION.

Whether the duty of inspection under the Virginia statute is imposed upon the mine foreman or boss is immaterial where a mine operator had knowledge of a squeeze in the mine and a boy of 17 years of age was put to work in that portion of the mine without an inspection by the mine foreman or boss, or by any other person on behalf of the operator. Under such circumstances the death of the boy, caused by a fall or rock due to an alleged squeeze, may be said to be the result of the operator's negligence, because of his failure to have the proper inspection made.

*Big Vein Pocahontas Co. v. Repass*, 238 Fed., 332, p. 335.

#### DELEGATION OF DUTY.

The mining statute of Virginia must be so construed as not to relieve a mine operator from seeing that all of its provisions are strictly complied with, nor from the duty imposed at common law to secure the reasonable safety of his employees and these duties are nonassignable, and if required by a foreman, boss, or fire boss, he shall be considered as acting for the mine operator as a vice principal.

*Big Vein Pocahontas Co. v. Repass*, 238 Fed., 332, p. 335.

#### DEFECTIVE CABLE—QUESTION OF FACT.

In the operation of a coal-cutting machine the question as to whether or not the cable extending from the machine to the jack pole and which served to hold the machine in place and which was subject to a strain of something like 4,000 pounds was worn and defective and whether a proper inspection of it would have disclosed its defective condition, can not be determined as a matter of law, but must be submitted to a jury as a question of fact.

*Tennessee Coal, Iron & Railway Co. v. Wiggins (Alabama)*, 73 Southern, 516, p. 517.

#### EMPLOYMENT OF MINE FOREMAN—LIABILITY FOR NEGLIGENCE.

The statute of Tennessee (Acts 1903, ch. 237), places upon the mine operator the duty of employing a certified mine foreman. The failure of a mine operator to employ a mine foreman duly certified is immaterial in an action by a miner for damages for injuries where there is no evidence whatever that any of the duties required of the mine foreman were neglected.

*Lively v. American Zinc Co. (Tennessee)*, 191 Southwestern, 975, p. 979.

**DUTY TO ADOPT RULES.**

The Kentucky statute (secs. 2738b-2738c) requires operators of coal mines to adopt rules for the safety of persons employed in and about the mines. A mine operator, who adopted rules, caused them to be printed in a book, and delivered a copy of the book to a miner, can not be held liable in damages for injuries to such miner received by him while violating a rule. It can not be objected that the rules were not adopted and promulgated in strict conformity to the statute for the reason that entirely independent of the statute, a mine operator has a right as an employer of labor to adopt reasonable rules and regulations for the safety and protection of his employees, and the violation of the rules so adopted and promulgated would be equally as effective to bar an action by an employee violating them as if the rules violated had been adopted and promulgated in accordance with the provisions of the statute.

*Gatliff Coal Co. v. Peace* (Kentucky), 192 Southwestern, 651, p. 653.

**SAFE APPLIANCES.****MEANING OF SAFE APPLIANCES.**

The statute of Tennessee (Acts 1915, ch. 169) requires that hoisting machinery used for lowering miners into and out of a mine shaft be kept in a safe condition. This imposes the duty on a mine operator to make the appliances safe and not merely to exercise reasonable diligence to make them safe. When a term having a well-recognized meaning in common law is used in a statute that meaning will be given it in construing the statute, unless a different sense is apparent from the context, or from the general purpose of the statute. Where the word "safe" is closely followed by special provisions looking to safety, the statute will be construed to intend that the result shall be attained by the use of these means so far as they extend. The term "safe" when used in respect to appliances to be furnished by an employer to an employee means "reasonably safe," and "reasonably safe" means such tools as are in general use among employers of ordinary caution and prudence in the same line of business under the same circumstances.

*Lively v. American Zinc Co.* (Tennessee), 191 Southwestern, 975, p. 977.

**CHANGE OF APPLIANCES NOT REQUIRED.**

Under the statute of Tennessee, requiring the use of safety appliances and safety cages in lowering and hoisting miners in and out of a mine, a mine operator has the right to choose between different kinds and types of implements in general use, and is not subject to a charge of negligence, or a violation of the statute, because some other style than that adopted by him may be found safer. A mine operator



or other employer is not required to change his machinery in order to apply every new invention or superior improvement, and he can use appliances, even though they are shown to be less safe than other kinds in use for the same ends without being liable to his employees for the consequence of such use.

*Lively v. American Zinc Co. (Tennessee)*, 191 Southwestern, 975, p. 979.

#### DUTY TO COMPLY WITH PROVISIONS OF STATUTE.

The statute of Tennessee (Acts 1915, ch. 169) requires that the elevator in a mine shaft used for lowering or hoisting persons shall be fitted with an improved safety catch and a sufficient metal covering overhead. It also requires sufficient flanges to be attached to the sides of every drum and other machinery used for lowering and hoisting persons with adequate brakes attached to the drum. The duty to comply with these and similarly specific provisions of the statute, designed as precautions against accidents and injuries is absolute and they can not be satisfied by a near approximation or by the exercise of reasonable diligence or ordinary care in an effort to comply.

*Lively v. American Zinc Co. (Tennessee)*, 191 Southwestern, 975, p. 977.

#### EMPLOYMENT OF BOYS.

##### VIOLATION—EMPLOYMENT OF CHILD OF PROHIBITED AGE.

Sections 71 and 72 of chapter 15H of the West Virginia Code of 1913 prohibiting the employment of a minor under 14 years of age impliedly permits the employment of minors over that age, and minors over that age are comprehended in the definition of employee protected and bound by the provisions of the workmen's compensation act.

*Rhode v. J. B. B. Coal Co. (W. Va.)*, 90 Southeastern, 796, p. 798.

##### VIOLATION OF DUTY—EMPLOYMENT OF BOY—NEGLIGENCE.

A coal-mine operator who employed a boy under 16 years of age to work in his coal mine in violation of the statute is liable aside from any question as to the prohibited age, where the operator placed the boy, without giving him any instructions at a trap door to open and close the same and where a driver coming from the opposite direction without waiting for the boy to open the door ran his motor through the closed door and ran over the boy, who was in the entry on the opposite side and close to the door.

*Carter Coal Co. v. Love (Kentucky)*, 190 Southwestern, 481, p. 482.

#### EMPLOYMENT OF CHILDREN—LIABILITY.

The statute of Kentucky (sec. 331a, subsec. 9) prohibits coal-mine operators from employing children under 16 years of age in any

capacity in or about, or in connection with any mine, coke oven, or quarry. In an action against a mine operator for the death of a boy under 16 years of age employed by an operator in violation of this statute, it is sufficient to sustain a recovery to prove that the boy was employed by the defendant operator and that he was under 16 years of age.

*Carter Coal Co. v. Love* (Kentucky), 190 Southwestern, 481, p. 482.

#### EMPLOYMENT OF BOY—RIGHT OF FATHER TO RECOVER.

In an action against a coal-mine operator for the death of a boy under 16 years of age, the fact that the father, the sole beneficiary and for whose use the suit was brought, consented to the employment of the boy, can not be taken advantage of on the trial of the case by the mine operator in the absence of an affirmative answer pleading the same.

*Carter Coal Co. v. Love* (Kentucky), 190 Southwestern, 481, p. 483.

#### VIOLATION BY MINER.

##### INTOXICATED MINER ENTERING MINE—PROXIMATE CAUSE OF INJURY.

The statute making it an offense for any person to enter a mine under the influence of intoxicating liquors or to carry intoxicating liquors into a mine (Alabama Laws, 1911, p. 536) was enacted for the benefit of the mine owner or operator and of his employees as distinguished from the public generally. Ordinarily the violation of a statute is negligence per se; but the violation of a statute to constitute negligence that renders a mine operator liable or will defeat a miner's action for damages must be the proximate cause of the injury complained of. A miner entering a mine under the influence of intoxicating liquors is guilty of an offense against the statute and such intoxication is a defense to an action by the miner for injuries where it is made to appear that such intoxication was the proximate cause of the injury complained of.

*Reynolds v. Woodward Iron Co.* (Alabama), 74 Southern, 360, p. 362.

#### MINER'S WORKING PLACE.

##### EXTENT—TRAVELING WAY.

The whole of a room in which a coal miner works while mining coal and while pushing cars used by him in his work is his working place, and no part of it is a traveling way within the meaning of section 6276 of the Kansas General Statutes of 1915.

*Ricardo v. Central Coal & Coke Co.* (Kansas), 163 Pacific, 641, p. 643.

**EFFECT ON CONTRIBUTORY NEGLIGENCE.****MINER'S KNOWLEDGE OF DEFECTS—FAILURE TO INFORM OPERATOR.**

The proviso of section 3910 of the employers' liability act of Alabama (Alabama Code, 1907), relieving an employer or operator from liability where the employee or miner knew of the defect and failed to inform the employer or operator, is intended to relieve the employee or miner from the imputation of contributory negligence predicated on the fact of his remaining in service after knowledge of the defect or negligence in an action by him for injuries; but it does not relieve him of the duty to give information of such defect or negligence when he knows of it and the employer or operator has no knowledge or notice thereof. But the employee or miner is not required to inform the employer or operator of the defect or negligence where the employer or operator already has knowledge of such defect or negligence.

*Reynolds v. Woodward Iron Co. (Alabama), 74 Southern, 360, p. 362.*

**AUTHORITY OF MINE FOREMAN.****AUTHORITY OF MINE FOREMAN TO EMPLOY ASSISTANT.**

Section 2726 (Kentucky statute) provides that the mine foreman shall have charge over the inside workings of a mine and of the persons employed therein. It also provides that assistants to the mine foreman may be employed by the operator or superintendent. Under this statute a mine foreman has no authority to employ an assistant mine foreman. But if a mine foreman employs an assistant and the assistant with the knowledge and acquiescence of the superintendent or operator of the mine acts in that capacity, their knowledge and acquiescence in the employment by the mine foreman and what the assistant was doing, would constitute an approval or a ratification of the employment and would place the assistant in the attitude as if he had been employed by the operator or mine superintendent as required by the statute. Under such circumstances a mine operator would be liable for the acts of such assistant to the same extent as if he had been appointed or employed by the operator or superintendent. But such an assistant can not recover for an injury received by a premature shot made by a miner in a part of the mine distant from the place where such assistant was required to perform his ordinary duties as a regular employee. If he was not an authorized assistant mine foreman, he was purely a volunteer and had no business to leave his work and go to another part of the mine where the shot was fired. If he went as assistant mine foreman, the mine operator would not be liable for injuries received by him from the shot. If he went as a volunteer, he can not recover, because as a volunteer he had no



business at the place where the shot was fired and no duty to perform there.

*Harris v. Lamb Coal Co.* (Kentucky), 190 Southwestern, 121, p. 123.

### MINERS' WASH-ROOM LAW.

#### MINERS' WASH-ROOM LAW—DUTY TO FURNISH SUPPLIES.

The miners' wash-room law of Indiana (Burns Stat. 1914, sec. 8623) requires miners' wash rooms to be supplied with cold and warm water and to be provided with all necessary facilities for persons to wash, and with lockers for the safe-keeping of clothing and relieves the operator from furnishing soap or towels. The proviso which excuses the mine owner from furnishing soap and towels makes it clear, from the other requirements that all other things essential to the equipment and maintenance of the wash room shall be furnished by the mine owner on the principle that where one thing is mentioned in a statute it is to the exclusion of all other things. Where the statute excepts from the things to be furnished in the maintenance of the wash-room soap and towels, it follows that all things necessary to its proper equipment and maintenance shall be furnished by the operator.

*Princeton Coal Co. v. Fettinger* (Indiana), 114 Northeastern, 406, p. 407.

#### MINERS' WASH-ROOM LAW—VALIDITY.

The miners' wash-room law of Indiana (Burns Stat. 1914, sec. 8623) requiring that miners' wash rooms shall be maintained by the coal companies is no more in conflict with the constitution than the part requiring that the wash room should be built by the mine owner. The act is constitutional and valid.

*Princeton Coal Co. v. Fettinger* (Indiana), 114 Northeastern, 406, p. 407.

#### FAILURE TO FURNISH WASHHOUSE—LIABILITY OF SUPERINTENDENT.

The statute of Indiana requiring mine operators to erect and maintain washhouses for the benefit of the employees (Burns Stat. 1914, sec. 8623) includes mine superintendents within its operation, and a mine superintendent who fails, on request of the miners to provide a wash room, is liable to a criminal prosecution under the statute.

*McQuade v. State* (Indiana), 115 Northeastern, 583.

### WORKMEN'S COMPENSATION ACT.

#### APPEAL—QUESTIONS CONSIDERED.

On appeal from a decision of the industrial board provided for by the workmen's compensation act of Illinois (Laws 1913, p. 347) the court, in reviewing the proceedings of the board, can only review

questions of law and can only determine from the facts recited in the decision of the industrial board whether that body acted within its powers in making the award.

*Kerens-Donnewald Coal Co. v. Industrial Board*, 115 Northeastern, 225, p. 227.

#### CONCLUSIVENESS OF FINDINGS.

Under section 19 of the workmen's compensation act of Illinois (Laws 1913, p. 347) when the industrial board acts within its power, its findings upon the facts are conclusive upon the courts.

*Illinois Midland Coal Co. v. Industrial Board*, 115 Northeastern, 527, p. 528.

#### FINDING—TOTAL AND PERMANENT DISABILITY.

A finding of the industrial board under the Illinois workmen's compensation act (Laws 1913, p. 347) that the injured workman is "now totally disabled," is not a finding and does not have the effect of a finding that the injured workman is permanently disabled. A man might now be totally disabled and yet not be permanently disabled.

*Illinois Midland Coal Co. v. Industrial Board*, 115 Northeastern, 527, p. 528.

#### JURISDICTION OF INDUSTRIAL BOARD.

The jurisdiction of the industrial board to review the proceedings of the committee of arbitration does not depend on the filing of a stenographic report within the time specified by the statute. It is sufficient if at any time before the hearing a properly authenticated stenographic report is filed with the industrial board. The date fixed by the statute as to the filing of the stenographic report is directory and not mandatory, and is not jurisdictional.

*Illinois Midland Coal Co. v. Industrial Board*, 115 Northeastern, 527, p. 528.

#### PRACTICE AND PROCEDURE.

The workmen's compensation act of Illinois (Laws 1913, p. 347) provides (sec. 16) that the industrial board may make rules and orders for carrying out the duties imposed upon it, and that the process and procedure shall be as simple and summary as reasonably may be. It provides also (sec. 19) for the appointment of a committee of arbitration, where the employer and employee can agree. There is no time fixed within which the committee shall make its investigation and report, and the statute in no way intimates that the committee of arbitration can be relieved from making a report because the members do not agree, but it positively provides that it shall report. When a committee was duly appointed and reported that it could not agree, it was the duty of the board to refer the matter back and require a final report from the committee.

*Kerens-Donnewald Coal Co. v. Industrial Board*, 115 Northeastern, 225, p. 226.

## MINES AND MINING OPERATIONS.

### NEGLIGENCE OF OPERATOR.

#### MINER'S KNOWLEDGE OF DANGER.

The fact that a foreman directed a rope tender to disentangle with his hands the rope while in motion in case it caught under the crossties and that in following the directions the miner was injured is not sufficient to charge the mine operator with negligence where presumptively the miner was a man in full possession of all of his faculties and fully appreciated the danger of taking hold of the rope while it was in motion.

*Victor American Fuel Co. v. Eidson*, 237 Fed., 999, p. 1102.

#### INCREASING DANGER.

A mine operator is liable on the ground of negligence for the death of a miner who with others and with the knowledge and consent of the operator entered a mine to extinguish a fire and while so in the mine seeking to extinguish the fire and without any knowledge on his part, the operator caused the fan to be started thereby driving the smoke and heat into the entries and places where the miner was compelled to go, causing his suffocation and death.

*Western Coal & Mining Co. v. McCallum*, 237 Fed., 1103, p. 1105.

#### AGREEMENT TO HAUL MINERS—CONTRACTING AGAINST NEGLIGENCE.

A railroad company constructed and operated a branch line from its main road to certain coal mines in operation and shipping over its road. By agreement between the mine operator and the miners on the one part, and the mine operator and the railroad company on the other, it was agreed that the railroad company should haul the miners from the mine to their homes for \$1.50 per month and that this amount should be deducted from their wages by the operator and by him paid to the railroad company monthly. The carriage was to be over the line of the railroad company and in its cars and subject to its direction and control. Under such circumstances each miner while being transported was a passenger on the road of the railroad company, and the company was, under the circumstances, a common carrier and it can not, as a common carrier, avoid responsibility for its own negligence, resulting in an injury to one of the coal miners, and can not by contract relieve or limit its liability as such common carrier.

*Vandalia Railway Co. v. Stevens* (Indiana App.), 114 Northeastern, 1001, p. 1006.



## METHOD OF MOVING CARS.

An employee of a coal-mine operator was given the duty of moving the loaded cars away from the tippie and setting empties at the tippie to be loaded. Another employee assisting in the work was directed to release the brakes on two empty cars and start them down the track to be placed at the tippie. As the cars came down of their own momentum they ran against another car standing on the track and pushed it against another car a few feet distant. In some manner unknown the first employee was standing between the couplings of these two cars, or passing between them as the first car was struck by the two sent down, and instantly killed. The mining company can not be charged with negligence where there is nothing to show the purpose for which the deceased employee passed between the cars at the particular time and where it also appeared that the empty cars started down to the tippie went at a speed of from 2 to 6 miles an hour, and where it appeared that there was nothing unusual in the manner of placing the empty cars and that the deceased employee was familiar with the methods adopted in placing the empty cars at the tippie, and nothing to show that it was customary to give any notice of the movement of cars down the incline, or to have a person stand on the front end for the purpose of warning persons who might happen to be on or near the track, or that the deceased employee had any right to depend on any warning or signal of the movements of the cars; but on the contrary, it appeared that the work in which he was engaged required him in the exercise of ordinary care for his own safety to keep a lookout for the movement of empty cars coming down the incline.

*West Kentucky Coal Co. v. Heady* (Kentucky), 190 Southwestern, 475, p. 477.

## PROOF OF CUSTOM AS AFFECTING LIABILITY.

Evidence of a custom in a mining district that a mine operator should look after the safety of roofs of entries to the mine and of the operator's responsibility for the condition of such roofs when notified of their defects and that an entry means a passageway high enough for mules to pull small cars through is admissible in an action for personal injuries resulting from the falling of a roof, where the miner was engaged in the entry.

*Ricardo v. Central Coal & Coke Co.* (Kansas), 163 Pacific, 641, p. 644.

## INJURY RESULTING FROM ONE OF TWO CAUSES.

Where an injury resulted to a miner from one of two causes for one of which and not the other the mine operator would be liable, the burden rests upon the injured miner to show with reasonable

certainty that the cause for which the operator is liable produced the injury, and if the evidence leaves it to conjecture the injured miner must fail in his action.

*Graves v. United States Smelting Co.* (Missouri App.), 192 Southwestern, 472, p. 473.

#### UNGUARDED TROLLEY WIRE—QUESTION OF FACT.

A coal-mining corporation operated its cars in its coal mines by means of electricity. The main trolley wire was strung in the heading 4 feet 7½ inches above the rail and about 6 inches outside of the rail. The wire was at all times heavily charged. At the different rooms extending off from the heading were switches by which the miners could take the cars into their several rooms. In order to get a car from the main track onto the switch it was necessary for a miner to go from his room into the heading and "slew" or shift the car from the main track to start onto the switch. The front end of the car was first shifted and the miner must then go to the other end and shift or slew it and then push the car into his room. A miner desiring a car in his room went into the heading, met a car, slewed or shifted the front end as usual, and in attempting to pass from the front to the rear, he stepped on the side of the car on which the trolley wire was strung and came in contact with the heavily charged wire and received a shock causing his death. The miner knew of the presence of the trolley wire, but had nothing whatever to do with placing it in position or with maintaining it in a dangerous or safe condition. The usual custom of the miners in shifting or slewing the car was to pass on the side opposite from the trolley wire. Under such circumstances and in view of the fact that many other mine operators in the community maintained unguarded wires in the operation of their cars by electricity, the questions of negligence of the operator as well as the contributory negligence of the miner are questions of fact to be determined by the jury.

*Reynold v. Woodward Iron Co.* (Alabama), 74 Southern, 360, p. 361.

#### PROOF OF NEGLIGENCE.

Where a miner was injured in the course of his employment the burden is upon him to show that his injury was caused by the negligence of the mine operator where his action for damages is based upon the alleged negligence of the operator.

*Western Coal & Mining Co. v. Harrison* (Arkansas), 192 Southwestern, 190, p. 191.

#### PROOF OF NEGLIGENCE.

In an action by a miner against a mine operator to recover for injuries received while in the service of the operator, the miner must establish three things to entitle him to a recovery: (1) Negligence

on behalf of the mine operator. (2) The happening of the accident resulting in the injury complained of. (3) That the injury complained of is the proximate result of the accident and the negligence of the defendant.

North Jellico Coal Co. v. Stewart (Kentucky), 191 Southwestern, 451, p. 453.

#### PERSON INVITED ON PREMISES BY FOREMAN—INJURY.

The chief engineer of a mining company after an electrical storm found an employee lying in an unconscious and dying condition as the result of an accident. In the absence of all superior officers, he sent a messenger for a physician. A physician obeyed the summons and on his arrival examined the body of the unconscious employee and went to the telephone to call an assistant. The physician in attempting to use the telephone was himself severely injured by a shock due to the negligent construction of the telephone lines, whereby a power wire carrying a high voltage had been strung immediately over the telephone wires and during the electrical storm the power wire had become displaced or broken, falling upon the telephone wires, charging them and causing the injuries to the employee and to the physician. Under the circumstances and in the absence of the company's chief officers and of the danger in attempting to call them by telephone, the chief engineer was justified in dispatching a messenger for a physician, and the physician on his arrival was not a trespasser but an invitee on the premises and it was the operator's duty to keep the premises in a safe condition, that he might not be injured while he was there professionally in response to the invitation. It is not a question of the authority of the chief engineer to bind the operator for the value of the services rendered by the physician to the injured employee, but he had authority to invite the physician upon the premises for the purpose of rendering aid to the injured employee, and the physician went upon the premises by express invitation and not as a licensee. The physician did not exceed his invitation by attempting to use the telephone. He needed assistance and the telephone being within reach, he did what anyone under like circumstances would have done. The telephone was one of the means he attempted to use to carry out the purpose of the invitation. The negligence in the defective construction of the power and telephone lines, and the failure to provide safeguards to prevent the power wire from falling upon the telephone wire is sufficient to render the operator liable, although the operator did not have actual knowledge that the power wire had come in contact with the telephone wire.

Jones v. Pennsylvania Coal & Coke Corporation (Pennsylvania), 99 Atlantic, 1008, p. 1009.



## NEGLIGENT ORDERS OF SUPERINTENDENT—QUESTION OF FACT.

In an action by a helper in the operation of a coal-cutting machine for damages for injuries received by being caught by a defective cable and dragged into the teeth of the machine, the question as to whether or not the order of the superintendent in ordering the helper to set up the jack pole and to hold the same in position when being drawn out of position by the force or strain on the cable attached to the jack pole was a negligent order, is a question of fact to be determined by the jury.

*Tennessee Coal, Iron & Railway Co. v. Wiggins* (Alabama), 73 Southern, 516, p. 518.

## DUTY OF OPERATOR TO FURNISH SAFE PLACE.

## SAFE PLACE—QUESTION OF FACT.

The duty rests upon a mine operator to use reasonable care to furnish a miner a safe working place; but the question as to whether or not this duty was performed and as to whether or not the place was safe is one for the determination of the jury.

*Big Vein Pocahontas Co. v. Repass*, 238 Fed., 332, p. 334.

## WHAT CONSTITUTES SAFE PLACE.

The doctrine of safe place does not apply to a place that is not in fact dangerous or unsafe, nor to a place where it appears that the work at such particular place was attended with more difficulty than other places. The doctrine does not apply where a laborer in a coal mine was employed to push cars through a tunnel and in consequence of a fall of slate the track had been raised, making an incline over the fall, and in attempting to push his car over the place, his strength being insufficient, the car rolled back upon him, causing the injury complained of.

*Saulsbury v. Elk Horn Consolidated Coal & Coke Co.* (Kentucky), 192 Southwestern, 20, p. 21.

## SAFE PLACE—APPLICATION OF DOCTRINE.

The rule requiring a mine operator to furnish a safe place for his miners to work does not apply to a miner who himself is making an unsafe place safe.

*Graves v. United States Smelting Co.* (Missouri App.), 192 Southwestern, 472.

The rule that a mine operator or other employer must exercise reasonable care to furnish a miner or an employee with a safe place in which to work does not apply where the miner or employee is himself creating the place in which he works, or where the danger was such as was created by the miner or employee in the progress of his work.

*New Hughes Jellico Coal Co. v. Gray* (Kentucky) 191 Southwestern, 78, p. 79.

## OPERATOR'S PROMISE TO REPAIR.

## PROMISE TO REPAIR—RELIANCE.

Where a miner complains of the dangerous condition in which he had to work that is due to the operator's negligence and the operator promises to remedy the same, the miner may in reliance upon the promise remain for a reasonable time in the employment without assuming the risk or depriving himself of the right to recover for injuries received because of such dangerous condition.

*New Hughes Jellico Co. v. Gray (Kentucky)*, 191 Southwestern, 78, p. 79.

A miner working at the bottom of a shaft complained to the operator of an extra and unusual amount of coal falling down the shaft and the danger thereof caused by constructing and maintaining the dumping blocks too low by which self-dumping cages were unloaded at the top of the shaft. On the promise of the operator to remedy the difficulty and remove the danger the miner had a right to rely for a reasonable length of time on the promise to repair and remedy the danger, and it is proper, under certain circumstances, for a court to submit to a jury the question of whether or not a reasonable time for making the repairs had expired.

*Western Coal & Mining Co. v. Harrison (Arkansas)*, 192 Southwestern, 190, p. 191.

## PROMISE TO REMEDY—MINER CONTINUING WORK.

The rule that a miner may continue to work in a dangerous place for a reasonable length of time after the operator has promised to remedy and remove the danger, without subjecting himself to the charge of contributory negligence, does not apply where the risk incurred in remaining in the place is so great and imminent that a reasonably prudent man would not incur it. The promise of the operator to remedy the conditions does not make it an insurer of the safety of the place for a reasonable time thereafter. The miner must still exercise ordinary care for his own safety, and if he exposes himself to dangers that are so threatening or obvious as likely to cause injury at any moment, he is, notwithstanding the promise of the operator, guilty of contributory negligence and can not recover for an injury received while continuing in such place.

*New Hughes Jellico Co. v. Gray (Kentucky)*, 191 Southwestern, 78, p. 79.

*Consolidated Coal Co. v. Spradlin (Kentucky)*, 190 Southwestern, 1069.

*Saulsbury v. Elk Horn Consolidated Coal & Coke Co. (Kentucky)*, 192 Southwestern, 20.

*Western Coal & Mining Co. v. Harrison (Arkansas)*, 192 Southwestern, 191, p. 192.

**MINER'S WORKING PLACE—SAFE PLACE.****MINER MAKING SAFE PLACE.**

The doctrine of safe place and of fellow servant and of assumed risk have no application where an experienced miner or timberman is set to work in a compartment to remedy defects and to make the compartment safe for miners using a ladderway in going into and coming out of the mine.

*Drajicevic v. Champion Copper Co. (Michigan), 160 Northwestern, 451, p. 452.*

**MINER'S ROOM AS WORKING PLACE.**

In an action by a miner for damages for injuries caused by a fall of rock from the roof, it appeared that the miner was sent into a room that had been partly worked out by another miner; that on the day before the miner went to work he examined the roof and concluded that the roof was bad and on complaint the mine boss promised to send in props and timbermen to fix the roof. Before the miner went to work he found some props and set them so that he could work in the face of the coal. The injury complained of was caused by a rock which fell from the roof in that part of the room from which the coal had been taken before he began work. Evidence was admitted tending to show that it was the custom in the mine for the mine operator to put a room in a safe condition when starting a miner to work in it, after it had been partly worked out by another miner. If any part of the miner's room was a traveling way under the statute, proof of such custom would be unnecessary and wholly immaterial. The existence of the custom argues that the whole of the room is the miner's working place and that no part of it is a traveling way. The evidence shows that the miner received his cars on the switch at the entry to his room, pushed the cars in, loaded them and pushed them out again to the switch, showing that the miner used the whole length of the room as his working place. Under such circumstances a court is compelled to say that the place in which the plaintiff was injured was his working place and not a traveling way within the meaning of the statute. A mine operator is authorized under the statute to require a miner to examine and prop his working place; and if a miner is so instructed and fails to make his working place safe, he can not recover from the operator for injuries due to his failure to make his working place safe.

*Ricardo v. Central Coal & Coke Co. (Kansas), 163 Pacific, 641, p. 644.*

**DUTY OF MINER TO INSPECT.**

Under a custom existing in a mine each miner was required to observe and to inspect the condition of his room in which he worked



and also the room neck where he was required to do at least a part of the work, and if he discover any loose slate or stone to remove it if possible and if not to report it to the mine boss. This custom did not impose the exclusive duty of inspection upon the miner, where it is shown that there was a mine boss or inspector and an assistant whose duty it was to inspect the condition of all parts of the mine where miners were at work. The inspector or his assistant visited the miner's room daily and made daily inspection of the room neck. The injured miner never discovered or reported any loose slate to the mine boss and the piece of slate that fell and injured the miner was the only one that ever fell from the room neck. Under the circumstances the mine operator can not be charged with negligence.

*North Jellico Coal Co. v. Stewart* (Kentucky), 191 Southwestern, 451, p. 453.

### DUTY TO WARN OR INSTRUCT.

#### DUTY TO WARN.

To order an employee to perform a dangerous service, standing alone, is not negligence, and to allege such fact without alleging other facts showing the duty on the part of the mine operator to warn, and a violation of such duty, does not charge negligence. While all machinery is more or less dangerous, still the duty to warn exists only in special cases. From the allegations of the complaint, it must be presumed that the plaintiff was a man in the full possession of all his faculties and was capable of appreciating and knowing the dangers of the service he was ordered to perform as well as the foreman; therefore the allegation that he did not know of the danger does not help his case.

*Victor American Fuel Co. v. Edison*, 237 Fed., 999, p. 1102.

#### DUTY OWING TO A VOLUNTEER.

A mechanic and miner who with the knowledge and consent of the mine foreman with others entered a mine for the purpose of putting out a mine fire, though classed under the term "volunteer" used in its broadest sense, assumed the risk of the conditions as they existed when he entered the mine, but he did not assume a new risk when the operator by affirmative action increased the danger. Under such circumstances it can not be said that the operator owed him no duty or that the duty owing consists merely in not intentionally injuring him. An employee who makes himself useful in a matter not covered by an express command, but whose services are accepted, though not in any express words, does not, as a matter of law, put himself outside the limits of his employment.

*Western Coal & Mining Co. v. McCallum*, 237 Fed., 1103, p. 1105.

**CONTRIBUTORY NEGLIGENCE OF MINER.****CONTRIBUTORY NEGLIGENCE AS QUESTION OF LAW.**

A miner working in his room discovered a crack in the roof and a piece of slate resembling a horse back that extended beyond and above the face of the coal. Before removing the coal, he reported the conditions as sufficiently dangerous to request the foreman to timber. However, he and his buddie continued working and removed the coal from beneath the slate so extending beyond the face of the coal. As an experienced miner, he knew that if the coal was removed from beneath the horse back, it would fall if not timbered, and he knew that it was not timbered. After removing the coal beneath the horse back he got upon the bottom bench and began shearing the rib, with knowledge of the fact that the slate was likely to fall and injure him at any time. Notwithstanding the foreman's promise to timber, the miner voluntarily exposed himself to an obvious, known, and imminent danger, which he knew was likely to cause injury at any moment, and he was therefore guilty of contributory negligence as a matter of law.

*New Hughes Jellico Coal Co. v. Gray (Kentucky)*, 191 Southwestern, 78, p. 79.

**BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE.**

In hauling coal cars out of a mine it was necessary at an incline to sprag the wheels of the car, and when the car reached the bottom of the incline it was customary for the driver to jump from the cars to protect himself. In an action for the death of a car driver caused by his failure to jump from his car, where the evidence established primary negligence on the part of the mine operator which proximately caused the injury complained of with nothing in the circumstances establishing contributory negligence on the part of the car driver, and where it did not appear that the deceased driver knew of the necessity of jumping from the car, the burden of proving the contributory negligence of the car driver rested upon the mine operator when it was interposed as a defense to the action.

*Folsom-Morris Coal Co. v. Dillon (Oklahoma)*, 162 Pacific, 696.

**DUTY OF MACHINE OPERATOR—WARNING TO HELPER.**

In an action by a machine helper for damages for injuries caused by being caught by the cable extending from the machine to the jack pole and drawn into the knives or bits of the machine, causing the injury complained of, it is proper, on the cross-examination of the machine operator to whose orders the helper was subject, to ask, and to require him to state, if it was not the purpose and custom in operating the machine to notify the helper whose duty it was to hold

the jack pole in place, when the machine was started and when the bits were put into the coal, in order that he might get out of the way. The evidence is proper in such a case on the question of the contributory negligence of the injured helper, as a failure of the machine operator to give the helper notice of the starting of the machine would tend to free him from the charge of contributory negligence.

*Tennessee Coal, Iron & Railway Co. v. Wiggins* (Alabama), 73 Southern, 516, p. 518.

#### INSTRUCTION—BURDEN OF PROOF.

In an action for damages for the death of a car driver killed while driving his first trip of cars in a coal mine, where the mine operator pleads as a defense that the plaintiff was guilty of contributory negligence, and where the plaintiff's evidence shows that the operator was guilty of negligence, but with nothing in the circumstances establishing contributory negligence on the part of the plaintiff, the court must instruct the jury that the burden of proving contributory negligence under such circumstances is upon the mine operator.

*Folsom-Morris Coal Co. v. Dillon* (Oklahoma), 162 Pacific, 696.

#### FAILURE TO OBEY INSTRUCTIONS.

A miner reported that the roof of his working place was bad and the bank boss instructed him to the effect that he did not want to shoot the roof down unless it was necessary, but if it did get bad, to go ahead and shoot it. This instruction gave the miner not only authority, but directions, to shoot down the roof whenever, in his judgment, it became necessary, and put upon him the duty of inspection to ascertain its condition as the work progressed. Under such circumstances the miner was guilty of such contributory negligence in failing to obey the directions of the mine boss as would defeat his right of action to recover damages for injuries sustained by reason of such disobedience.

*Consolidated Coal Co. v. Spradlin* (Kentucky), 191 Southwestern, 78, p. 79, January, 1917.

*Graves v. United States Smelting Co.* (Missouri App.), 192 Southwestern, 472.

#### KNOWLEDGE OF DANGER.

A laborer was employed in a mine to push the cars of coal over a track and through a tunnel to a dumping place. There had been a fall of slate in the tunnel and the track over which the cars were pushed was laid over the pile of slate, making a hump in the track. The employee had knowledge of the situation and of the condition of the track. In attempting to push a load of coal over the hump his strength was insufficient and the car started back and ran against and upon him, causing the injury complained of. Under the circum-



stances and with knowledge of the condition of the track he was held to be guilty of such contributory negligence as to prevent a recovery.

*Saulsbury v. Elk Horn Consolidated Coal & Coke Co. (Kentucky)*, 192 Southwestern, 20, p. 21.

#### VIOLATION OF RULES BY MINER—RECOVERY.

A coal-mine operator has a right to adopt reasonable rules and regulations for the safety and protection of his miners and employees, and when rules of this nature have been adopted an employee or miner who is familiar with the rules can not recover from the operator damages for injuries received at a time when he was violating the rules, or for injuries that would not have been received except for his violation of the rules.

*Gatliff Coal Co. v. Peace (Kentucky)*, 192 Southwestern, 651, p. 653.

#### ASSUMPTION OF RISK.

##### RISKS ASSUMED.

##### VOLUNTARY SERVICE.

A machine foreman working in a mine and pursuing the duties required of him on hearing a shot fired in another part of the mine that he thought was fired out of order or not according to the schedule for firing shots, left his work and went to the part of the mine and entered the room where he thought the shot had been fired. As he entered the room another shot that had been prepared exploded causing the injury complained of. In going to the place where he received the injuries, he was not acting in his capacity as machine foreman or looking after the machine men as they had nothing to do with shooting or blasting coal. He did not receive his injuries while working in his capacity as machine foreman or while doing anything connected with his duties as such. His duty as machine foreman did not require him to give any attention to shots fired out of time or to go to the place where the noise from an explosion came from, or to investigate the cause of it. It follows that he could not recover damages for injuries sustained at a time when he was in a place where his duties did not require him to be and while acting purely as a volunteer.

*Harris v. Lamb Coal Co. (Kentucky)*, 190 Southwestern, 121, p. 122.

##### ORDINARY RISKS OF EMPLOYMENT.

An employee in a coal mine assumes not only such risks as from the nature of the business, as ordinarily conducted, he must have known, but also those which the exercise of his opportunities for inspection would have disclosed to him.

*El Paso Coal, Land & Fuel Co. v. Howell (Colorado)*, 161 Pacific, 293, p. 294.

## MINER MAKING PLACE SAFE.

An experienced timberman in a mine, 32 years of age, engaged in repairing a compartment in a mine shaft, which because of its age was in need of repair so as to make it a safer place for the miners who had occasion to use the ladderway in this compartment can not recover from the mine operator for injuries caused by falling rock in the process of the work.

*Drajicevic v. Champion Copper Co. (Michigan), 160 Northwestern, 451.*

## KNOWLEDGE IMPLIED.

An employee in a coal mine assumes the ordinary risks incident to the employment, although he does not have actual knowledge of the risk, if it is such that an ordinarily prudent man, under the circumstances, could by reasonable diligence have discovered it.

*El Paso Coal, Land & Fuel Co. v. Howell (Colorado), 161 Pacific, 293, p. 294.*

## INJURY FROM CURTAIN—QUESTIONS OF FACT.

A coal-mine operator caused to be suspended at the entrance to one of the rooms in a coal mine a curtain of excessive and unnecessary length so that a part of it lay upon the floor of the mine and upon the track over which the coal was hauled out. A driver of coal trips was required to stop his car at the entry and pass through the curtain in order to stop his train and attach another car, and while alighting from his car for such purpose, owing to the darkness of the entry, he was tripped by stepping on that part of the curtain which lapped and folded on the floor of the entry and was thrown down, receiving the injuries for which he sued. The complainant had no knowledge of the curtain's excessive length and to charge him with the assumption of the risk would involve the question whether or not an ordinarily prudent man would under the particular circumstances have noticed that the curtain was too long and this is a question of fact that must be determined by the jury upon all the facts and circumstances of the case.

*El Paso Coal, Land & Fuel Co. v. Howell (Colorado), 161 Pacific, 293, p. 294.*

## INJURY TO ASSISTANT MINE FOREMAN—VOLUNTEER.

A coal-mine operator can not be charged with negligence and rendered liable in an action by a person professing to act as assistant mine foreman, or otherwise as a volunteer, where the operator had fixed a regular time for firing shots by the miners, and where a miner mistaking the time had prematurely prepared his shots and where on the firing of the first shot before the fixed time, the assistant mine foreman left his place of work and went to the part of the mine where the shot was fired and where, as he entered the room, a second shot went off, causing the injuries complained of. If the employment as

assistant mine foreman was regular and the injured person was in fact an assistant mine foreman, the internal operations of the mine were under his directions; but if he was not regularly employed as assistant mine foreman, he was then a volunteer, not in the course of his employment, at the time of the injury, and in neither event could he recover where there was no negligence on the part of the mine operator with reference to the shots.

*Harris v. Lamb Coal Co. (Kentucky)*, 190 Southwestern, 121, p. 123.

#### RISKS NOT ASSUMED.

##### FAILURE TO PROVIDE SAFE PLACE.

A mine operator may be guilty of such negligence as will render him liable for an injury to a miner caused by blocks or pieces of coal falling down the shaft, where in the operation of self-dumping cages the dumping blocks are made and maintained too low, as this causes the coal to lodge on the edge of the chute and as the cage would swing back it would knock the coal into the shaft. Miners working at the bottom of a shaft and the bottom cager assume the risk of pieces of coal falling down the shaft due to the overloading of cages and the method of operating cages, yet the miners at the bottom of the shaft do not assume the risk of large and unusual amounts of coal falling down the shaft.

*Western Coal & Mining Co. v. Harrison (Arkansas)*, 192 Southwestern, 190, p. 191.

##### DANGERS FROM CURTAIN AT ENTRY.

A mine operator hung at the entry a curtain longer than necessary so that a part of it lay upon the floor and on the tracks where coal was hauled out. A driver of coal cars was required to stop his trip at the curtain in order to pass through and to take on another car. The curtain made the entry dark and in alighting from his car the driver, without knowledge of the excessive length of the curtain, and of the fact that a part of it lay upon the floor and across the track, caught his foot in the folds of the curtain causing him to stumble and fall and thereby received the injuries for which he complained. In the light of the circumstances it can not be said as a matter of law that the knowledge of the curtain's excessive length should be imputed to the driver, or that having such knowledge there was danger to him in such excessive length of the curtain. The danger was not obvious and reasonable men might draw different conclusions as to the complainant's duty to recognize that injury to him might result from the length of the curtain. Accordingly, it can not be said as a matter of law that the complainant assumed the risk incident to the excessive length of the curtain.

*El Paso Coal, Land & Fuel Co. v. Howell (Colorado)*, 161 Pacific, 293, p. 295.



**NEGLIGENCE OF FELLOW SERVANT.****LIABILITY OF OPERATOR.**

A miner was injured by being struck in the eye with particles of rock and dirt caused by a fellow miner striking a bowlder with a hammer. There was no negligence on the part of the mine operator and the fellow miner in striking the bowlder was engaged in the ordinary duties of the employment as was the miner who received the injury. Under such circumstances there can be no recovery, it being caused by the act of a fellow servant.

*Misenhelter v. Geronimo Lead & Zinc Co.* (Missouri App.), 192 Southwestern, 147, p. 148.

**VICE PRINCIPAL AS FELLOW SERVANT.**

The dual capacity doctrine of servant and vice principal may be invoked for the benefit of the vice principal as well as for the benefit of a fellow servant. A vice principal or foreman may have general charge and control of miners or employees, but where he is performing the same character of work as are the men under his control, and is injured by the negligence of another employee, the employer may be liable, if under the circumstances he is made liable for the negligence of a fellow servant. Where a vice principal or foreman was injured by being struck in the eye with pieces of rock or dirt caused by another employee and miner striking a bowlder with his hammer, the question of the negligence of the miner in striking the bowlder is one of fact to be determined by the jury.

*Misenhelter v. Geronimo Lead & Zinc Co.* (Missouri App.), 192 Southwestern, 147, p. 149.

**METHODS OF OPERATING.****OPERATING UNDER LEASE.**

A coal-mining company, as owner with the right to operate a certain mine, entered into a contract with another as lessee and contractor, whereby the latter was to mine certain coal pursuant to an existing agreement. The lessee and contractor was to furnish the necessary equipment and material for the operation of a successful mine and to pay all costs and charges and wages in whatsoever nature involved in the mining operations, and to turn the mine back to the lessor in good condition. Under such a lease and agreement the lessee or contractor occupies the position of an independent contractor respecting the operation of the mine. Under such circumstances a person in the employ of the lessee and contractor and injured while working in the mine can not hold the lessor liable for the injuries under the workmen's compensation act of Kansas, where there is nothing to show that the work in which the plaintiff was engaged was under the direction, execution, or control of the lessor.

*Maughlille v. Price & Son* (Kansas), 161 Pacific, 907.

## MINING ON LANDS OF ANOTHER—LIABILITY.

The owner of certain coal lands sued the owner of adjoining lands operating a coal mine thereon for damages for taking coal. The plaintiff charged that the defendant by his superintendents, agents, miners, and employees entered upon the plaintiff's land adjoining and mined and removed therefrom a large quantity of the plaintiff's coal and converted the same to his own use. The evidence showed that the defendant leased to a third person the coal underlying his land, adjoining the land of the plaintiff; that in mining the coal the lessee of defendant trespassed upon the plaintiff's property and mined and removed a large quantity of coal belonging to the plaintiff; that the coal so mined by the lessee was carried to the surface through a coal mine belonging to the defendant and delivered at the mouth of the mine to the defendant in his own cars; that the defendant paid the royalty on the coal so mined by the lessee on the plaintiff's property, and that the defendant on demand for compensation for the coal taken made no disclaimer of responsibility and accountability, except that he had paid the royalty on the coal. The evidence also showed that during the period covering the trespass the lessee was superintendent of the defendant's mine. Under such circumstances and evidence the trial court could not disregard a verdict for the plaintiff and render judgment for the defendant.

*Philson v. Wells* (Pennsylvania), 100 Atlantic, 463.

## DANGEROUS METHOD OF OPERATING MACHINERY.

An oil well drilling and pumping company is not liable in damages for injuries to an employee who adopted unnecessarily and admittedly dangerous methods of throwing in the clutch of a gas engine which was used in running the pump of an oil well, and by reason of which the injuries complained of were received.

*Murphy v. Standard Oil Co., etc.*, 140 Louisiana, —; 73 Southern, 678, p. 679.

## REMOVAL OF SUPPORT.

The right of an owner of the surface to support, whether by natural right or by agreement, imposes an absolute obligation upon the servient owner, regardless of any negligence on his part in making excavations or improvements. The right of subjacent support is a right of property passing with the soil, as otherwise the surface can not be enjoyed at all.

*Audo v. Western Coal & Mining Co.* (Kansas), 162 Pacific, 344, p. 346.

## PURCHASE OF ENGINE—IMPLIED WARRANTY OF FITNESS.

A coal-mine operator hauled his coal cars and coal by horsepower from his mine to a shipping point, a distance of about 3,000 feet. He proposed changing the motive power to steam and entered into

negotiations with a manufacturer for the purchase of a locomotive for that purpose. The manufacturer visited the mine, examined the conditions, character of the track and the distance, and offered for a stated price to manufacture a locomotive engine suitable in size and capacity with the necessary appliances for properly and sufficiently hauling the operator's coal and coal cars. The offer was accepted, and the manufacturer constructed and delivered a locomotive engine. The engine was received and installed, and after repeated trials was found to be unfitted and wholly insufficient to do the work needed. A written order for the engine was made and signed by the mine operator that contained no express warranty that the engine should be suitable for the particular purpose, but under the circumstances the law creates an implied warranty under the rule that when a purchase is made for a particular purpose that is known to the seller, and especially where a manufacturer is informed as to the use which the buyer expects to make of the machine or implement and the work which he expects it to accomplish, there arises an implied warranty of fitness of the article, under proper management, to perform the work for which it was intended. The manufacturer knew the purpose for which the locomotive was being purchased and the use to which it was to be put, and had examined the premises and the track over which it was expected to run, and having manufactured the locomotive with this knowledge and in the absence of an express warranty, an occasion for the application of the doctrine of implied warranty is completely furnished, and a warranty is imposed by law to the effect that the locomotive manufactured for and furnished to the mine operator would, with proper management, fill the purpose for which it was bought; and failing to do this, the mine operator was not liable to the manufacturer for the price of the locomotive.

Glover Machine Works v. Cooke-Jellico Coal Co. (Kentucky), 191 Southwestern, 516, p. 518.



## MINING LEASES.

### LEASES GENERALLY—CONSTRUCTION.

#### LEASE AS AN INCUMBRANCE.

Under the statute of Colorado (R. S. 1908, sec. 865) prohibiting a mining corporation from encumbering its mining property without the consent of a majority of the stockholders, a lease is an encumbrance and is voidable at the election of the stockholders, if not approved or ratified by the holders of a majority of the shares of stock.

*Elder v. Western Min. Co.*, 237 Fed., 966, p. 971.

#### WANT OF VALIDATION BY STOCKHOLDERS—EFFECT OF LACHES.

A mining corporation by its directors executed a lease of its mining property for a term of years without the approval of a majority of the stockholders as required by the statute of Colorado. The lease was extended from time to time for different periods without the knowledge of the stockholders. The last agreement for an extension was made three years and more before the extended term commenced. The stockholders did not learn of the extension until three years or more after the agreement and until nearly a year after the extended term began. A suit was commenced by the stockholders to avoid the lease within less than a year after they had knowledge of the unwarranted extension. The stockholders had the right to rely upon the faithful discharge by the trustees of their duties upon the legal presumption that they would not execute a lease, or an extension of a lease of the property, until approved by a majority vote of the shares of stock. No duty rested upon the stockholders to watch over or search out acts of their trustees, and neither trustees nor the lessee, who knew that the lease lacked the necessary statutory approval of the stockholders, can be permitted to defeat the suit of the stockholders to avoid the lease because the suit was not brought sooner. The delay, under the circumstances, is not sufficient laches, acquiescence, or ratification on the part of the stockholders to estop them from maintaining a suit to avoid the lease.

*Elder v. Western Mining Co.*, 237 Fed., 966, p. 975.

#### CONSTRUCTION—CONFLICT BETWEEN PRINTED AND WRITTEN PARTS.

An oil and gas lease was executed on a printed or typewritten blank and words and parts were written in to make it complete. In certain parts of the lease there was a conflict between the printed

words of the blank form and the matter written in. In such case where there is reasonable doubt as to the sense and meaning of the entire lease, the words in writing will control the construction of the contract. The reason for this is that the written words are the immediate language and terms selected by the parties themselves, while the printed form was intended for general use without reference to particular objects.

*Producers Oil Co. v. Snyder* (Texas Civil App.), 190 Southwestern, 514, p. 515.

#### ROYALTIES FROM OPEN MINES.

Under a will providing for the operation of mines and for the exploration of other mineral lands and directing the method of the payment of royalties, no distinction can be made between open and unopened mines so far as concerns the royalties to be received under the terms of the will. The testator's purpose was to have all the leased mines opened and worked and leases were made by the testator under which ground rent was to be paid whether ore was mined or not, but if ore was mined, then the payment was to be in royalties, and the payment of royalties during any year was to discharge the ground rent provided for pro tanto for any such year.

*Pettit's Estate, In re* (Minn.), 161 Northwestern, 158, p. 162.

#### IMPLIED OBLIGATION TO DEVELOP.

Under the laws of Kentucky no one will be permitted to acquire and hold leases without development where the payment of a royalty upon the ore produced is provided for in the terms of the lease.

*United Mining Co. v. Morton* (Kentucky), 192 Southwestern, 79, p. 84.

#### CERTAINTY AS TO TIME.

A city by a lease with a landowner acquired the natural gas rights to a tract of land and agreed to pay therefor an annual rent of \$200. The lease provided that it should remain in force for the same length of time as another lease covering gas rights to an adjoining tract upon which the city was then operating natural gas wells. This reference to another lease sufficiently fixed the duration of the lease in controversy and it is not subject to the objection that it is indefinite and uncertain and therefore void.

*Eutler v. City of Iola* (Kansas), 163 Pacific, 652.

#### ORAL SURRENDER.

The owner of a mining lease can not assign his rights to a stranger except by a writing, but a lessee in a mining lease may orally surrender the lease to the lessor.

*United Mining Co. v. Morton* (Kentucky), 192 Southwestern, 79, p. 84.

## MACHINERY—REMOVAL.

Under a lease of mining property the parties may by their contract stipulate what machinery and fixtures may be removed and when they have done so such stipulations are controlling. Mining machinery, apparatus and appurtenances placed upon mining property by a lessee are not regarded as fixtures that pass with the soil and leased appurtenances, but are regarded as the personal property of the lessee that may be removed by him in the absence of an express stipulation in the lease to the contrary.

*Shaleen v. Central Coal & Coke Co. (Arkansas)*, 192 Southwestern, 225, p. 227.

## FIXTURES—RIGHT TO REMOVE TIPPLE.

A mining lease provided that at its expiration the lessee could remove all machinery, pit cars, mine rails, and pipe that had been placed on the mining premises, if the lessee had performed the terms and covenants of the lease, but all other property on the leased premises at the expiration of the lease shall belong to and revert to the lessor. On the expiration of the lease, the lessee removed the mining machinery and also the tippie erected by him on the leased premises. In an action by the lessor to recover possession of the tippie, it was proper for the court to submit to the jury the question whether the tippie was a part of the mining equipment and removable as such under the lease.

*Shaleen v. Central Coal & Coke Co. (Arkansas)*, 192 Southwestern, 225, p. 227.

## RIGHT TO REMOVE MACHINERY AND FIXTURES.

Where a mining lease gave the lessee the right at its expiration to remove from the leased premises all machinery, pit cars, mine rails, etc., the right to remove the machinery stipulated does not expire at the instant of the expiration of the lease, but the lessee where actively engaged in removing the machinery has a reasonable time to continue the removal after the lease actually expired.

*Shaleen v. Central Coal & Coke Co. (Arkansas)*, 192 Southwestern, 225, p. 227.

## OIL AND GAS LEASES.

## CONSTRUCTION—SEPARATE LEASES.

An oil and gas lease embraced 19 quarter sections of land and provided that the drilling of a well or wells should stop rent only upon the quarter section or sections upon which such well or wells are located. According to the terms of the lease, it must be construed as a separate lease of each quarter section, requiring the sinking of a well on each quarter section in order to avoid forfeiture.

*Producers Oil Co. v. Snyder (Texas Civil App.)*, 190 Southwestern, 514 p. 516.



## CONSTRUCTION—ROYALTIES.

A gas lease provided a graduated scale of royalties based on a minute's pressure and the scale contained a minimum pressure but was silent as to the use of gas or payment therefor while the pressure was below the minimum. The lease did not limit the right of the lessee to take gas only so long as the pressure should exceed the minimum of 15 pounds; but there is no provision for the payment of royalty when the pressure falls below the minimum. Under the lease and the standard for the payment of royalties, the lessor is not entitled to royalties for gas produced below the minimum pressure, though it was used or marketed by the lessee.

*Alderman v. Manufacturers Light & Heat Co. (Pennsylvania)*, 100 Atlantic, 444, p. 446.

An oil and gas lease bound the lessee to deliver to the credit of the lessor in a pipe line one-eighth of the oil produced when the average daily production of the wells did not exceed 10 barrels; one-sixth when the production exceeded 10 barrels, but did not exceed 40 barrels, and one-fourth when the production exceeded 40 barrels. There is no evidence of mutual mistake in the execution of the lease in not basing the royalties upon the average daily production of a single well as a unit, such as will justify a court of equity in reforming the instrument.

*Siluran Oil Co. v. Neal (Illinois)*, 115 Northeastern, 114, p. 115.

## CONSTRUCTION—OBLIGATION.

A mining lease executed by several lessors or grantors by which they disposed of the mineral rights on their several tracts of land for a gross sum without stating the amount paid to each grantor or designating the area of land belonging to each, creates a general obligation on the part of such lessors, because it is important to affirm that the lessee would have paid a proportionate consideration for the lease of the mineral rights on only a portion of the land. A stipulation in such a lease to the effect that operations for the drilling of a well for oil or gas shall be commenced by the lessee within one year can not be construed to mean that the operations for the drilling of a well shall be commenced on each separate tract of land belonging to the different lessors.

*Nabors v. Producers Oil Co.*, 140 Louisiana, —; 74 Southern, 527, p. 532.

## CONSTRUCTION—OBLIGATION TO DRILL.

In a lease of land for the production of oil and gas in which the lessee expressly obligated himself to begin the drilling of a well within one year or forfeit the lease, there is no implied obligation on his part to drill as many wells as may be reasonably necessary to secure the

oil or gas for the common advantage of the lessor and lessee within the year, where oil or gas has not been found in paying quantities.

*Nabors v. Producers Oil Co.*, 140 Louisiana —, 74 Southern, 527, p. 532.

#### CONSTRUCTION OF LEASE—INTEREST OF LESSEE.

An ordinary oil and gas lease giving a lessee the right to enter upon lands and drill for oil and gas and other minerals, does not vest in the lessee the title to the oil and gas in the land and is not a grant of any estate therein, but is only a grant of the right to prospect for oil, and gas, and no title vests until these minerals are reduced to possession by extracting them from the earth.

*Kelley v. Harris (Oklahoma)*, 162 Pacific, 218, p. 220.

#### PRACTICAL CONSTRUCTION.

Where the construction of an oil and gas lease or other contract is in doubt the acts of the parties thereunder may frequently be resorted to for the purpose of ascertaining how they construed the instrument. Under this rule the court will adopt the construction placed upon an oil and gas lease by the lessee and that he abandoned the same when he was no longer entitled to drill upon the premises by virtue of the lease.

*Kelley v. Harris (Oklahoma)*, 162 Pacific, 218, p. 221.

#### LEASE CONSTRUED AGAINST LESSEE.

Where the language of an oil and gas lease was as much that of the lessee as that of the lessor the lease will be construed most strongly against the lessee in order to provoke development and prevent delay and unproductiveness looking to all parts of the instrument in the light of the facts in connection with the operation.

*Paraffin Oil Co. v. Cruce (Oklahoma)*, 162 Pacific, 716, p. 718.

#### NATURE OF LEASE—INTEREST OF LESSEE.

A lease of land for oil and gas obligated the lessee to pay a stipulated royalty for all the oil or gas that might be produced, and provided that under penalty of forfeiture the lessee should commence the drilling of one well within one year of the execution of the lease or pay a stipulated consideration each year for an extension of the time not exceeding a period of three years in all, and provided also that if the lessee discovered oil and gas within the time limit or within the extension of the time limit as provided the lease shall remain in full force and effect for 20 years from the discovery of oil or gas and as much longer as minerals are produced in paying quantities. The lessee in addition to the stipulations in the lease paid an adequate cash consideration. Such a lease is a conveyance of a real right and can not be construed as a sale of a mere hope of producing oil or gas

within one year of its execution; and where the lessee complied with his obligation by commencing the drilling of a well within the year from the execution of the lease and continued to prosecute the work with due diligence the lessor is not entitled to a cancellation of the lease at the expiration of the year on the ground that he fully discharged his obligation by permitting the lessee to attempt to realize his hope within the year.

*Nabors v. Producers Oil Co.*, 140 Louisiana, —; 74 Southern, 527, p. 534.

#### INTERESTS AND RIGHTS OF LESSEE.

In the absence of a specific covenant in an oil and gas lease making the lessee liable for damages to growing crops and their surface rights the lessee is not liable for such damages as are necessarily incident to the operations authorized by the lease. Such a lease carries within its implications, if not within its expression, such rights to the surface as may be necessarily incident to the performance of the objects of the contract, yet these implications go no further and the lessee must protect the surface of the ground in so far as such incident necessity does not exist and is liable to the lessor for any damages to the surface resulting from acts not within the implications of the lease.

*Pulaski Oil Co. v. Conner (Oklahoma)*, 162 Pacific, 464, p. 466.

#### PRIORITY OF LEASES—NOTICE OF PRIOR LEASE.

The question as to whether or not an original oil and gas lease was not properly acknowledged and was not entitled to record, and was not, therefore, when recorded, constructive notice, is immaterial in a controversy between the original lessee and junior lessees where it is shown that the junior lessees had actual knowledge of the original lease and that such original lessee had paid the rentals as provided in his lease, and where the second lessee orally agreed to protect the lessors against any litigation or damages by reason of the original lease.

*Mexico-Wyoming Petroleum Co. v. Valentine*, 237 Fed., 539, p. 545.

#### PRIORITY OF LEASE—NOTICE—PROOF OF DEVELOPMENT.

In an action by the holder of an oil and gas lease to enjoin operations by a subsequent lessee of the same property proof on the part of such junior lessee to the effect that by their labors they had increased the value of the property from \$40 an acre to about \$5,000 an acre is improper and inadmissible where it appears that such subsequent lessees took their lease and performed the labor with full notice and knowledge of the first lease, and that two wells, of the wells claimed to enhance the value of the property, were drilled after the commencement of the suit by the holder of the first lease.

*Mexico-Wyoming Petroleum Co. v. Valentine*, 237 Fed., 539, p. 542.



## FAILURE TO DEVELOP.

A delay in the development of an oil and gas lease for a period of 16 months on the part of a first lessee is far within the statute of limitations in an action at law, and the burden of showing that the enforcement of a prior lease as against subsequent lessees with notice would be inequitable is upon such subsequent lessees. Mere lapse of time does not ordinarily constitute laches, but the situation of the parties must have so changed as to render the enforcement of the first lease inequitable as against the subsequent lessees.

*Mexico-Wyoming Petroleum Co. v. Valentine*, 237 Fed., 539, p. 543.

## IMPLIED OBLIGATION TO DEVELOP.

There is an implied condition in every lease of land for the production of oil that when the existence of oil in paying quantities is made apparent the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee, but this doctrine has no application to a lease where there has been no discovery of oil or gas within the delay period.

*Nabors v. Producers Oil Co.*, 140 Louisiana, —; 74 Southern, 527, p. 533.

## DILIGENCE IN OPERATIONS—DETERMINATION.

Where the object of the operations contemplated by an oil and gas lease is to obtain a benefit or profit for both lessor and lessee neither is, in the absence of a stipulation to that effect, the arbiter of the extent to which or the diligence with which the operations shall proceed, but both are bound by the standard of what under the circumstances would be reasonably expected of operators of ordinary prudence, having regard to the interest of both.

*Paraffin Oil Co. v. Cruce* (Oklahoma), 162 Pacific, 716, p. 721.

## POWER OF LESSEE TO TERMINATE.

A lessee in an oil and gas lease can not set up his own default in order to terminate the lease or escape liability under its provisions. If he fails to perform the covenants of the lease it is with the lessor to declare a forfeiture. Where such a lease provides that if the premises should not be operated the lease should be void the word "void" means "voidable" at the election of the lessor and he must do some act evincing an intention to avoid the lease before it can be considered void or terminated. Such provisions are for the benefit of the lessor and he has an option to discontinue the lease on default of the lessee or affirm the continuance of the contract. If such a lease provides that the lessee's failure to complete a well within a stated period or any default thereof to pay a certain yearly rental should render the lease null and void and all rights and claims should

therefrom cease, still the lessee by his own default can not relieve himself from the liability already incurred.

*Lavery v. Mid-Continent Oil & Development Co. (Oklahoma)*, 162 Pacific, 737, p. 739.

#### POWER OF LESSEE TO CANCEL—LIABILITY.

A landowner leased to a city the gas rights to a tract of land at an annual rental of \$200. The lease provided that it should remain in force for the same length of time as another lease held by the city giving it gas rights to an adjoining tract of land and upon which the city was then operating gas wells. After paying the annual rental for seven years, and while still operating gas wells on the adjoining lands under the lease referred to, the city has no power to cancel the lease in question by executing and recording a release thereof and refusing to make further payments of rental on the ground that the gas rights obtained by the lease are of no value. The city by the lease in question obtained more than a mere license to explore for oil and gas and to pay upon certain contingencies a royalty, but by the lease in question the city obtained the gas rights of a tract of land and agreed to pay an annual rental therefor so long as the lease remained in force. The inducement for obtaining the lease in question was to protect the rights of the city under the lease on the adjoining land is apparent from the fact that the city sunk no wells on the land covered by the lease.

*Butler v. City of Iola (Kansas)*, 163 Pacific, 652, p. 653.

#### AGREEMENT TO ASSIGN LEASE—CANCELLATION.

Two persons held separate interests in leases for different tracts of oil lands. One lessee agreed to assign to the other an undivided one-half interest in leases held by him and the other agreed to assign his interest in leases held by him. The latter agreed also that any profits or benefits that he might derive from a contract between himself and a certain oil company should be equally divided between the two persons. It was also agreed that the latter should pay to the former a salary of \$250 per month from the date of the contract and that the first named person should operate all of the property under the supervision of the second. It was agreed that the second party might cancel the contract at any time. In an action by the second party to compel the first party to the agreement to execute the conveyance of the leases as contemplated in the agreement, parol evidence is inadmissible to show that a subsequent written agreement entered into between the parties was intended to cancel the former, where the subsequent written agreement itself presented conclusive evidence that it was not intended as a complete extinguishment of the former agreement.

*Piper v. Kellerman (California)*, 162 Pacific, 423, p. 425.

## FORFEITURE—FAILURE TO DEVELOP.

An oil and gas lease provided that it should remain in force for the term of one year from its date and as long thereafter as oil or gas is produced from the premises by the lessee; and providing that "if said territory proves to be productive, then the party of the second part to complete this contract shall drill as many as eight wells on said premises and said wells shall be drilled with due diligence and dispatch having in view the interest of both parties hereto, and so to produce all the oil or gas that may be reasonably produced from said premises." The lessee proceeded immediately and within 30 days drilled a productive well upon the leased premises. It then became his duty to proceed immediately to drill the eight wells as contemplated by the lease. The word "if" as used in the quoted clause means "when" and the word "then" used in the quoted clause, is an adverb of time and means "at the time," that is, at the time the territory proved productive by the drilling of the test well it was then the duty of the lessee to drill as many as eight wells upon the leased premises and within a year from the date of the lease as a condition precedent to the extension of the lease beyond the term of one year. Whether such wells were by the lessee drilled with due diligence and dispatch, having in view the interest of both parties to the lease and so as to produce all the oil and gas that may be reasonably produced from the premises as required by the lease, is a question of fact to be determined in connection with all the circumstances attending the operations. The fact that a test well was profitable and that there was at its completion a profitable market make the failure of the lessee to drill as many as eight wells with due diligence sufficient ground for the forfeiture of the lease on the part of the lessor.

*Paraffin Oil Co. v. Cruce (Oklahoma)*, 162 Pacific, 716, p. 717.

*Lavery v. Mid-Continent Oil and Development Co. (Oklahoma)*, 162 Pacific, 737.

## FAILURE TO DEVELOP—RIGHT TO CANCELLATION.

When the lessee of land for the production of oil or gas has paid an adequate cash consideration and has complied with the only obligation expressly required of him during the first year after the execution of the lease, by the drilling of the one test well required and has not found oil or gas in paying quantities, the lessor can not compel a cancellation of the lease on the ground that the lessee failed to perform an implied obligation to drill more than one well for the common advantage of the lessor and lessee.

*Nabors v. Producers Oil Co.*, 140 Louisiana —; 74 Southern, 527, p. 533.



## FORFEITURE—FAILURE TO EXECUTE RELEASE.

In an action by a landowner against a lessee who had forfeited his lease for damages on the ground of his failure and refusal to execute a release and remove the cloud from the title, the landowner as complainant must prove that he had a valid contract with a prospective purchaser or lessee enforceable according to its terms, had the release by the defendant been executed, or that such prospective purchaser would have completed his contract of purchase or lease regardless of its enforceability, had such release been executed.

*Rogers v. Milliken Oil Co.* (Oklahoma), 161 Pacific, 799, p. 800.

## OPTION TO FORFEIT.

By the terms of an oil and gas lease the lessee, an oil company, for a valuable consideration specifically undertook to commence and with diligence drill a well on the premises into a designated sand. The lease contained a clause providing that a failure to commence and complete said well should work a forfeiture and render the lease null and void. This forfeiture provision was for the benefit of the owner of the leasehold interest and gave him the option to declare a forfeiture upon the failure of the oil company to discharge its obligation to drill. The oil company could not by virtue of the forfeiture clause and without the consent of the owner terminate the contract by its own default and thereby escape liability for resultant damages.

*Lavery v. Mid-Continent Oil & Development Co.* (Oklahoma), 162 Pacific, 737, p. 739.

## CONSTRUCTION—OPERATION AND DEVELOPMENT.

Leases executed for the purpose of exploring and operating for oil and gas frequently contain provisions designated to compel the prompt commencement of operations and the diligent prosecution of the development of the land. In the construction of such leases the courts endeavor to discover and enforce the intention of the parties as gathered from the language used in the instrument as a whole. When the terms of such a lease will permit, it will be so construed as to promote development and prevent delay and unproductiveness.

*Paraffin Oil Co. v. Cruce* (Oklahoma), 162 Pacific, 716, p. 718.

## ABANDONMENT—REMOVAL OF MACHINERY.

The lessee under an oil lease who drills a well which proves unprofitable, may abandon the lease and land and may within a reasonable time exercise the right conferred by the lease to remove the machinery, fixtures, and improvements made upon the land and may remove pipe placed in the ground by him in his mining operations. Eight months from such abandonment is a reasonable time within which to remove the machinery and fixtures and pipe.

*Standard Oil Co. of Louisiana v. Barlow*, 141 Louisiana —; 74 Southern, 627.

## ACTION FOR ROYALTIES.

In an action by a lessor against the lessee of an oil and gas lease for royalties it is not improper for the court to instruct the jury as to the amount the lessor claims as due and owing for gas furnished and marketed by the defendant under the terms of the agreement sued upon, as such an instruction is not a statement of any fact but is only a statement of the plaintiff's claim.

*Laurel Oil & Gas Co. v. Anthony* (Oklahoma), 162 Pacific, 203, p. 204.

## TEST—METHOD OF MEASURING GAS.

An oil and gas lease provided that the lessee should pay to the lessor for any wells producing gas in sufficient quantities to justify the lessee in marketing the same in its pipe line, a semiannual sum to be ascertained by gaging the wells in the casing in which they were completed every six months, and if a well should show for the first minute a pressure of 200 pounds or more the rental should be \$250 for the next six months; if the wells should show a pressure from 150 to 200 pounds, the rental to be \$200, and on down according to a graduated scale to a minimum pressure of 15 to 25 pounds and a rental of \$25. The lease did not determine when or designate the pipe or casing in which the well should be completed and according to the evidence the words used have no defined trade meaning. Under the peculiar wording and the operation of the lease, the question as to whether a well was completed in a 3-inch casing or in a 6½-inch casing is one of fact to be determined by the jury.

*Adderman v. Manufacturers Light & Heat Co.* (Pennsylvania), 100 Atlantic, 444, p. 445.

## MINING PROPERTIES.

### TAXATION.

#### CONSTRUCTION AND APPLICATION OF STATUTE.

The Legislature of Nevada in 1905 (Statutes 1905, p. 81), passed an act authorizing assessors to assess patented mines. The statute points for its authority directly and specifically to the constitutional amendment adopted at the general election in November, 1902, and takes its constitutional authority and its operative vitality directly from the constitutional amendment that provides for the assessment of patented mines at a flat valuation of \$10 per acre.

*Wren v. Dickson* (Nevada), 161 Pacific, 722, p. 725.

#### CONSTITUTIONAL PROVISIONS—SELF-EXECUTING.

The constitution of Nevada was amended at the general election in November, 1902. The amendment provided that patented mining claims should be assessed at a valuation of \$10 per acre. The legislature of 1905 (Statutes 1905, p. 81) passed an act, pursuant to the mandate of the amendment authorizing assessors to assess patented mines at a flat valuation of \$10 per acre. The constitution was again amended at the general election in 1906, by which it was provided that the proceeds alone of unpatented mining claims should be assessed and taxed, and when patented each patented mine should be assessed at not less than \$500, except when \$100 in labor has been actually performed on such patented mine during the year in addition to the tax upon the net proceeds. This provision of the amendment of 1906 is self-executing and in effect nullified the amendment of 1902 as to the assessment of patented mines at a flat valuation and rendered nugatory and of no effect the statute of 1905, authorizing the assessment of patented mining claims at a flat valuation of \$10 per acre. After the adoption of the amendment of 1906 an assessment of a patented mining claim could not be made under the act of 1905 that was based on the amendment of 1902, and any attempted assessment under the act of 1905 made subsequent in time to the adoption of the amendment of 1906 was invalid.

*Wren v. Dickson* (Nevada), 161 Pacific, 722, p. 725.

#### TAXATION WHERE ANNUAL ASSESSMENT LABOR HAS BEEN PERFORMED.

The amendment of the constitution of Nevada at the general election of 1906 (Revised Laws, sec. 352) provided that each patented mine shall be assessed at not less than \$500, except when \$100 in labor has been actually performed. A mine or mining claim upon



which \$100 worth or more of labor has been expended during any one year and prior to the time of assessment is exempt from taxation except on the proceeds thereof.

*Wren v. Dickson* (Nevada), 161 Pacific, 722, p. 725.

#### METHODS OF ASSESSMENT.

The constitutional amendment of 1906 (Nevada Revised Laws, sec. 352) contains two distinct negatives as to the assessment of mining claims: (1) A patented mine can not be assessed at less than \$500, if \$100 worth of work has not been performed; (2) A patented mine on which \$100 worth of labor has been performed can not be assessed at either more or less than \$500, but is exempt from taxation except on the proceeds thereof. Where the annual labor has been performed assessment for any sum is prohibited. Where the annual labor has not been performed, the assessment for a sum less than \$500 is prohibited. These prohibitory provisions of the constitutional amendment are self-executing.

*Wren v. Dickson* (Nevada), 161 Pacific, 722, p. 728.

#### TAX ON OIL PRODUCTION—FEDERAL AGENCY.

The statute of Oklahoma (Session Laws 1916, p. 102) imposes a tax equal to 3 per cent of the gross value of the production of petroleum or other crude or mineral oil and natural gas less the royalty interest. It also provides that the payment of such tax shall be in full and in lieu of all taxes by the State, county, city, township, or other municipalities upon any property rights attached to or inherent in the right to such minerals, upon leases for the mining for petroleum or other crude oil or other mineral oil, or for natural gas, upon the mining rights and privileges belonging to or appertaining to land, upon the machinery and equipment used in or around any well producing petroleum or other crude or mineral oil or natural gas and actually used in the operation of a well. This statute is not subject to the objection that because the business was carried on and the production brought about through the instrumentality of a Federal agency, the State is without power to impose a tax. The tax provided for by this act is not upon the agency or the means employed by the producer, but is upon the production of oil and gas, and is therefore a "tax on property" as such and is valid without regard to the agency employed in its production. The act does not impose a tax upon the operations of an oil company, or upon its right to engage or continue in business, but upon the commodity which it produces and the tax is made in full and in lieu of certain of its other property and as a substitute therefor. The tax is payable upon the gross value of the oil and gas produced without regard to the value of the other enumerated property of the producer in lieu of which the tax is imposed.

*Large Oil Co. v. Howard* (Oklahoma), 163 Pacific, 537, p. 539.

## TAXATION—CONSTRUCTION OF STATUTE.

The statute of Oklahoma (Session Laws 1916, p. 102), imposes a tax equal to 3 per cent of the gross value of the production of petroleum or other crude or mineral oil and natural gas less the royalty interest. It also provides that the payment of such tax shall be in full and in lieu of all taxes by the State, county, city, township, or other municipalities upon any property rights attached to or inherent in the right to such minerals, upon leases for the mining for petroleum or other crude oil or other mineral oil, or for natural gas, upon the mining rights and privileges belonging to or appertaining to land, upon the machinery and equipment used in or around any well producing petroleum or other crude or mineral oil or natural gas and actually used in the operation of a well. This statute does not purport to tax the leases or the mining rights or privileges or any investments therein. The tax is laid upon the oil and gas produced without regard to the value of the property or mining rights, leases, privileges, machinery, appliances, and equipment used in or around any producing well. The lease through which the rights or privileges are secured furnishes only the evidence of title or ownership and not a subject of taxation.

*Large Oil Co. v. Howard* (Oklahoma), 163 Pacific, 537, p. 543.

## TAX ON OIL AND GAS—CONSTITUTIONALITY OF STATUTE.

The tax imposed by the act of the Oklahoma Legislature of May 14, 1916 (Session Laws 1916, p. 102), is not, because of its amount, repugnant to section 9, article 10, of the constitution, which provides that the State levy on an ad valorem basis shall not exceed in any one year  $3\frac{1}{2}$  mills on the dollar. This act imposes a special tax on oil and gas in lieu of and as a substitute for the general ad valorem tax on certain property of the producer and is levied pursuant to sections 13 and 22, article 10, of the constitution, which authorizes the State to select its subjects of taxation, classify and value property so selected by means and methods different from that commonly employed in the assessment, levy and collection of taxes by municipal authorities generally.

*Large Oil Co. v. Howard* (Oklahoma), 163 Pacific, 537, p. 547.

## TAX ON OIL AND GAS—EFFECT ON INDIAN TREATY RIGHTS.

The act of the legislature of Oklahoma of May 14, 1916 (Session Laws 1916, p. 102), imposing a tax of 3 per cent on the gross value of the production of oil and gas can not deprive an oil company of its power to serve the Indians or the General Government acting in their behalf. The act does not impair the treaty rights of the Osage Indians for whom the federal Government lawfully undertakes to act and it is too remote and indirect to be regarded as an

interference with the Federal agency or a direct burden upon its free exercise.

*Large Oil Co. v. Howard* (Oklahoma), 163 Pacific, 537, p. 547.

#### CONSTRUCTION AND APPLICATION OF STATUTE.

The act of the Oklahoma Legislature of May 14, 1916 (Session Laws 1916, p. 102), imposes a tax of 3 per cent on the gross value of the production of petroleum or crude oil and of natural gas, less the royalty interest. This statute must not be confounded with the act of May 26, 1908 (Session Laws 1907-8, p. 640) that provides a gross revenue tax which shall be in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of an oil company equal to a per centum of its gross receipts as therein provided. Then, while the present act provides that the tax is in full and in lieu of all taxes, the act of 1908 by express terms makes the tax "in addition to the taxes levied and collected upon an ad valorem basis."

*Large Oil Co. v. Howard* (Oklahoma), 163 Pacific, 537, p. 546.

#### INVALID TAX SALE—RECOVERY—STATUTE OF LIMITATIONS.

The amendment of the constitution of Nevada at the general election of 1906 (Nevada Revised Laws, sec. 352), prescribing the method of the assessment and taxation of patented mines and mining claims completely nullified the amendment of 1902 and the act of the legislature of 1905 (Nevada Statutes 1905, p. 81), authorizing the assessment of patented mining claims at a flat valuation of \$10 per acre. Any assessment of a patented mining claim made under the act of 1905, after the adoption of the amendment of 1906, was void, and any subsequent sale for taxes on such an assessment was wholly void and of no effect whatever. Under the statutes of Nevada, an action to recover a mining claim must be brought within two years, and, though a tax sale should be wholly invalid, the original owner must commence his action to recover the claim within the statutory period unless the lawful owner was under some disability, and in such case the period of disability can not be a part of the time limit for the commencement of the action; but in such case an action may be commenced within two years after the removal of the disability.

*Wren v. Dickson* (Nevada), 161 Pacific, 722, p. 731.

#### TRESPASS.

##### PROOF OF DAMAGES—LIMITATION AS TO TIME.

In an action for damages for trespass to a mine and mining property it is not proper to prove any damages or depreciation in the mining property prior to the time the complainant acquired title. In esti-



inating or arriving at the damages the jury can not base its estimate on the theory adopted and given by witnesses that covering a period of 10 years, 40 per cent of the damages and depreciation was to be charged to the first four years and 60 per cent to be charged to the remaining 6 years, where the evidence shows that the defendant was in possession for the six years only.

*Llewellyn v. Sunnyside Coal Co. (Pennsylvania)*, 99 Atlantic, 869, p. 870.

#### RENTAL VALUES—CROSS-EXAMINATION OF WITNESS.

In an action of trespass to recover damages for injuries to a coal mine and mining property and for the rental value of land in connection with the mining property, a witness who gives his opinion as to the rental values based on his knowledge of the sales of such property may be asked on cross-examination as to rentals paid for the properties referred to as a test of his good faith and credibility.

*Llewellyn v. Sunnyside Coal Co. (Pennsylvania)*, 99 Atlantic, 869, p. 871.

#### REMOVAL OF ORE—FRAUD—STATUTE OF LIMITATIONS.

The Golden Eagle Mining Co. and the Emperor-Quilp Co. were the owners of adjoining mining claims. Between September 1910 and August 1912, the Emperor-Quilp Co. exposed and developed their vein of ore to the point of intersection with the boundary line between its claim and that of the Golden Eagle Mining Co. at the depth of between 300 and 500 feet below the surface of the ground. The Emperor-Quilp Co. by its officers and employees knowingly and wrongfully entered upon and into the claim of the Golden Eagle Mining Co. and extracted and removed ore therefrom of the value of several thousands of dollars. At that time there were no underground workings of any character upon the claim of the Golden Eagle Mining Co. and it did not discover, nor have any means of discovering such wrongful removal of the ore until December, 1912. In December, 1915, more than three years after the wrongful removal of the ore, but less than three years after its discovery, the Golden Eagle Mining Co. commenced an action against the Emperor-Quilp Co. to recover the value of the ore so wrongfully removed. Under the statute of Washington an action for waste or trespass upon real property must be commenced within three years after the cause of action has accrued. But in actions for relief upon the ground of fraud the cause of action is not deemed to accrue until the discovery thereof by the aggrieved party. In some States, notably Pennsylvania and California the courts hold that the secret taking of ore from beneath the surface of the ground is in effect a fraud upon the rights of the owner of the property trespassed upon and such as gives him a cause of action for relief upon the ground of

fraud thereby changing the rule as to the statute of limitations. The Supreme Court of Washington made no distinction between the wrongful taking of ore between 300 and 500 feet below the surface from an unworked mining claim and that of an ordinary fraud practiced in the open where detection might follow without delay, and accordingly held that the action was barred in the three years from the time the trespass was committed.

Golden Eagle Mining Co. v. Imperator-Quilp Co. (Washington), 161 Pacific, 848.

See Lewey v. Fricke Coal Co., 166 Pa. 536, 31 Atlantic 261, 45 Am. St. 684, 28 L. R. A. 283.

Lighthner Min. Co. v. Lane, 161 California 689, 120 Pacific, 771.

Lindley On Mines (3d ed.) paragraph 867.

Langley v. Devlin (Washington), 163 Pacific, 395.

### LIENS.

#### FORECLOSURE OF MORTGAGE—SUPERIOR TITLE.

Ordinarily an adverse title to mining property paramount to a mortgage can not be litigated in a proceeding to foreclose the mortgage; but the litigation of the title in such proceeding is not without jurisdiction though it may be error if it be over the objection of the owner of the paramount title. But if the complaint in the foreclosure proceedings alleges that the defendant claims an interest or a lien which if valid is subsequent to the mortgage, the defendant is bound to assert his permanent title, or his interest or lien and on failure to do so he is bound by a decree unless appealed from.

Dickerman Inv. Co. v. Oliver Iron Min. Co. (Minnesota), 160 Northwestern, 776, p. 778.

## QUARRY OPERATIONS.

### FELLOW SERVANTS.

An employee in a stone quarry was pushing an empty car upon the main track from the crusher to the place in the quarry at which it was loaded. Shortly before he reached the part of the main track intersected by the spur two other employees of the company in charge of a loaded car that was standing chocked on the spur, carelessly and negligently removed the chock thereby permitting the loaded car to run down the spur to the main track where it collided with the empty car and injured the employee pushing the empty car. The employees operating these two separate cars were not fellow servants within the rule that would defeat the injured employee's right of recovery. They were fellow servants only in the sense that all were employed by the same master and engaged in similar services but the operators of the empty car had no control or direction over the operators of the loaded car and the two employees pushing the empty car were not so associated with the two persons operating the loaded car as that they could, under the circumstances, and by the exercise of ordinary care and attention, protect themselves from the negligent acts of the operators of the loaded car.

*Cummins v. Sparks Coal Co. (Kentucky), 191 Southwestern, 515.*



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